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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-67

WILLIAM WALTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Petitioner William Walter respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

Opinions Below.

The 2-1 opinion of the Court of Appeals was filed on April 2, 1979, and appears as Appendix A. The decision is reported at 592 F.2d 788. A published but still unreported per curiam opinion which denied a petition for rehearing and petition for rehearing en banc yet discussed an issue previously asserted and not before commented upon by the court was entered on June 15, 1979 and appears as Appendix B.

Jurisdiction.

The judgment of the Court of Appeals was entered on April 2, 1979, over the dissent of Circuit Judge Wisdom. Petitioner duly filed a petition for rehearing with suggestion for determination en banc, which petition was denied on June 15, 1979, after the court had been polled at the request of one of its members for an en banc hearing. A copy of the order denying said petition appears as Appendix B. Thereafter, petitioner filed a motion for stay of issuance of mandate pending petition for writ of certiorari to the United States Supreme Court, which motion was granted on June 22, 1979, provided a petition for writ of certiorari is filed in the clerk's office of this Court on or before July 15, 1979. A copy of the order staying issuance of the mandate is attached as Appendix C. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

The petitioner was charged with conspiracy and aiding and abetting violations of the federal obscenity laws. Twelve sealed cartons containing 871 8-mm films of male homosexual orientation were taken by a third party from a common carrier and then, at the FBI's direction, held for five days before the FBI took delivery of them. FBI agents viewed the films two months later and two months after that turned the films over to the United States Attorney's Office. Over a year later an indictment was returned charging that five of the 25 titles of film were obscene. No search warrant was ever obtained, nor was there ever an adversary hearing. Trial evidence revealed petitioner was a business partner of a defendant shown to have authorized the shipment of film. Petitioner, however,

was not shown to have ever seen the films in question or to have exercised any role in the business within two months either before or after the shipment. With the foregoing explanation, the questions presented are:

(1) Whether the FBI's acceptance from a third party of films wrongfully within that party's possession was a "seizure" subject to the warrant requirement of the Fourth Amendment, or alternatively, whether the rule fashioned in *Burdeau v. McDowell,* 256 U.S. 465, fifty years ago requires a two-step analysis of the "seizure"—that by the third party and that of the government—where First Amendment concerns are involved as has been held by the Eighth Circuit but not by the Fifth or Ninth Circuits.

(2) Whether the FBI's screening after a two-month hiatus of films received from a third party who had not viewed the films constituted both a "secondary search" subject to the warrant requirement of the Fourth Amendment as had been held in a similar case by the Eighth Circuit as well as a "search" within the teaching of *United States v. Chadwick,* 433 U.S. 1.

(3) Whether the Government by appropriating presumptively protected First Amendment material received from a third party for one and one-half years without requesting a judicial determination of the obscenity *vel non* of said material committed a prior restraint the penalty for which is suppression of the material's use in a criminal trial in accordance with the provisions of the First, Fourth and Fifth Amendments to the Constitution and the interpretive decisions of this Court.

(4) Whether in an obscenity prosecution *derivative* proof of scienter solely through evidence of petitioner's

participation in a management role in a presumptively legal business venture which shipped numerous films, and without any further proof that he knew of or authorized the solitary shipment of films charged as being obscene, deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution and the interpretive decisions of this Court.

(5) Whether in an obscenity prosecution the refusal of the district court to instruct the jury that in calculating the mores of the community the term "average person" means "average adult" violated the teaching of *Pinkus v. United States,* 436 U.S. 293, that the community includes all adults who comprise it since person" subsumes the class "children" and the instruction therefore deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution.

(6) Whether in an obscenity prosecution involving films of an exclusively homosexual orientation an instruction foreclosing jury assessment of the prurient appeal, if any, of the films to homosexuals absent proof *beyond a reasonable doubt* that the films were intended to appeal to the prurient interest of homosexuals deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution and the interpretive decisions of this Court.

(7) Whether a juror who read a book and frequently stared at the floor on the sole occasion when the allegedly obscene films were screened for the jury was either incompetent to render a judgment regarding the obscenity *vel non* of the films which must be *"taken as a whole"* under the directive of *Miller v. California,* 413 U.S. 15, or so prejudiced against the defense that petitioner was deprived of freedom of speech and press, due process of law, and an impartial jury, contrary to the provisions of the First, Fifth and Sixth Amendments to the Constitution.

(8) Whether in an obscenity prosecution involving films of an exclusively homosexual orientation the refusal of the district court to *voir dire* the veniremen concerning their length of residence in the community, participation in community organizations, knowledge of community standards from the standpoint of personal exposure, knowledge of the mores, customs and practices of the homosexual community and opinion whether sexually explicit matter causes harm negated the mandate of *Smith v. United States,* 431 U.S. 291, that a defendant be given reasonable latitude in presenting *voir dire* questions to the veniremen and, accordingly, deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution.

(9) Whether due process of law under the Fifth Amendment required that petitioner's case be severed from co-defendant Sanders' so that co-defendant Grassi, who had entered a guilty plea during trial, could testify to exculpate petitioner and inculpate Sanders on the scienter issue, which Grassi had indicated he would do but not unless there were a severance since his former attorney was counsel for co-defendant Sanders and could impeach Grassi with other crimes Grassi had confidentially communicated to him if Grassi waived his attorney-client privilege and testified in favor of petitioner and against co-defendant Sanders.

(10) Whether the refusal of the district court to give petitioner's proffered jury instruction on his theory of the case developed through cross-examination that certain terms in the obscenity formulation were incapable of calculation deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution and the interpretive decisions of this Court.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fourth, Fifth and Sixth Amendments to the Constitution, Title 18, United States Code §§ 2, 371, 1462 and 1465 and Rule 14, Federal Rules of Criminal Procedure, appear as Appendix D hereto.

Statement.

Petitioner appeals from a judgment of conviction rendered after a trial by jury before the Honorable Wm. Terrell Hodges, a judge of the United States District Court for the Middle District of Florida, Tampa Division, under an indictment charging both conspiracy to violate and aiding and abetting violations of Title 18, United States Code, Sections 1462 and 1465.

The indictment was returned in the United States District Court for the Middle District of Florida, Tampa Division, on April 6, 1977, and contained eleven counts charging petitioner and five others (two of whom were corporations) with violations of federal obscenity laws. Count One charged a conspiracy both to use a common carrier to transport obscene matter in interstate com-

merce and to transport obscene matter in interstate commerce for the purpose of sale or distribution. Counts Two, Four, Six, Eight and Ten charged the petitioner and others with aiding and abetting one another in using a common carrier to transport obscene matter in interstate commerce. Counts Three, Five, Seven, Nine and Eleven charged the petitioner and others with aiding and abetting one another in transporting obscene matter in interstate commerce for the purpose of sale or distribution.

A. Prior to trial, petitioner filed a motion to suppress and return the subject films. In connection with the hearing of that motion the following facts were adduced:

On Thursday, September 25, 1975, twelve (12) sealed boxes containing 871 8mm films of homosexual orientation were shipped via Greyhound Package Express from St. Petersburg, Florida, to Atlanta, Georgia (R.T. Vol. 1 Supp. at 6.)[1] The shipment, directed to "Leggs, Inc." on a "Will Call" basis, was reforwarded to a Greyhound substation contrary to Greyhound's usual practice of holding "Will Call" items for pick up—whereupon L'Eggs Products, Inc. ("LPI") was contacted to pick up the package. (R.T. Vol. 1 Supp. at 20-21, 33-35.)

Michael Horton, Area Manager for LPI, drove to Greyhound to pick up the packages on Friday, September 26, 1975. Horton, accustomed to receiving only one or two boxes weighing but a few pounds, was surprised to see twelve unusually wrapped and reinforced boxes weighing hundreds of pounds. Since the

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[1]"R.T." refers to the Reporter's Transcript of the Record on Appeal.

boxes did not look "normal" to him, Horton pried one open and removed a box of film labeled "David's Boys." The box purported to describe its film contents. (The "David's Boys" series of films found in the shipped cartons consisted of 25 different titles of film of which 5 were charged in the indictment.) Horton then replaced the box of film, advised an employee at the Greyhound terminus that the shipment did not belong to LPI and left. (R.T. Vol. 1 Supp. at 56, 59, 61, 76-77, 81-82, 99.)

When Horton returned to LPI he advised his Branch Manager William Fox about the shipment. Fox immediately went to the Greyhound terminus, examined a box of film from the already opened package and concluded that the 12 cartons were not the property of LPI. Fox did not pay the collect charges on the packages since LPI had no interest in them, but he took the shipment back to LPI nonetheless. (R.T. Vol. 1 Supp. at 119, 121, 129, 131; Vol. 7 at C-146-47, C-150, C-178.)

At LPI, Horton, Fox, Gregory Shults (LPI's Southern Regional Distribution Manager) and others opened all twelve cartons and examined the boxes containing the David's Boys films. Shults removed an 8mm film from its case and held it up to the light, but the frames of the film were too small to be observed in this fashion. Thereafter, Horton telephoned the FBI and informed Special Agent Lawrence Mandyck of what had happened. Mandyck instructed him to put the boxes in a safe place "where nobody can bother them" and that the FBI would pick them up. (R.T. Vol. 1 Supp. at 63, 65, 90, 107, 133, 143-44, 171.)

Five days later on Wednesday, October 1, 1975, Agent Mandyck passed by LPI to pick up the 871

boxes containing film. Mandyck conceded that the box cover description of the films may have been incorrect and that he caused no application to be made for a search warrant during the five day hiatus although he easily could have obtained a warrant. At LPI the container cartons were arranged so that only the white tops of the boxes of film could be seen without removing the individual boxes from their container. Mandyck or another FBI agent opened a film box and unsuccessfully sought to "eye view" the reel of film therein. (The evidence reflects that each boxed reel of film was sealed by a piece of tape to keep it from unraveling. Accordingly, before a reel of film could be viewed, the tape had to first be removed.) (R.T. Vol. 1 Supp. at 93, 116, 134, 171, 192, 195, 206.)

On Friday, September 26, 1975, co-defendant Michael Grassi called from Atlanta to ask co-defendant Richard Larson in St. Petersburg, Florida what had delayed the expected shipment of films from Larson. Larson reported that the films had been shipped to the Atlanta warehouse via Greyhound using the name "Leggs, Inc." as consignee—"Legs" being the nickname of a female employee in the Atlanta warehouse. In the past, shipments had been made and received using the name "Leggs, Inc." That same day Larson contacted Greyhound express clerk Joe Harris in St. Petersburg to report the non-receipt of the shipment and to initiate a tracer on the package. He left a name and telephone number. (R.T. Vol. 1 Supp. at 13-14; Vol. 4 Supp. at 5-6; Vol. 7 at C-25, C-29-31.)

Gregory Shults of LPI attempted unsuccessfully to find out the consignor's address since it was fictitious. (Several witnesses explained that a fictitious name on shipment bills of lading was employed to prevent common carrier pilferage which occurred when the name

of a known adult business was used.) Shults also spoke to Griffin Askew, Assistant Terminal Manager for Greyhound in Atlanta, to advise him that LPI was turning the shipment over to the FBI and he gave Askew the local FBI telephone number. (R.T. Vol. 1 Supp. at 31, 35-36, 50, 150, 167, 228-29; Vol. 4 Supp. 5-6.)

The defendants made numerous attempts to retrieve their misdelivered shipment. Ronald Bowman was sent to the Greyhound station in St. Petersburg on Monday, September 29, 1975 to look for the packages. A girl named Joyce telephonically contacted Griffin Askew at Greyhound on three occasions attempting to recover the shipment. Askew, however, had been advised by the FBI not to provide any information about the shipment and to call them if contacted about the twelve boxes. Askew complied with these directives. Defendant Grassi went to the Greyhound station personally three times looking for the package, leaving his name and number. He also contacted LPI on Tuesday, September 30, 1975, and several times thereafter. LPI never admitted that they had the shipment. LPI's Fox apparently received two calls from someone trying to get the films back and specifically recalls speaking to Grassi but he believed their telephone conversation occurred about two weeks after LPI acquired the films. (R.T. Vol. 1 Supp. at 36, 50-52, 125; Vol. 4 Supp. at 6-10; Vol. 7 at C-30, C-138, C-147.)

Agent Mandyck did not review the films in the boxes he seized until December, 1975, even though he was aware the defendants were trying to get their merchandise back. It was not until February, 1976, that Mandyck through the filing of a report notified the United States Attorney's Office in Atlanta, Georgia,

that he had the films in question. An adversary hearing to determine the obscenity *vel non* of the films was never conducted. (R.T. Vol. 1 Supp. at 192, 193, 208; Vol. 7 at C-163.)

The trial judge concluded that petitioner had standing to assert the motion to suppress and return. (See petitioner's testimony, R.T. Vol. 1 Supp. at 223-257.) The motion was denied, however, on the grounds that defendants did not have a reasonable expectation of privacy in the subject materials and "that there was a private search and no Government seizure within the meaning of the Fourth Amendment." (R.T. Vol. 4 at 109-10, 115-16.)

B. Preceding the trial, petitioner filed proposed *voir dire* questions with the court. (C.T. Vol. 2, Doc. 46.)[2] Some of the proposed questions the judge refused to ask prospective jurors, in addition to their length of residency in the community, were:

> "120. In this case you will be asked to view males engaging in homosexual sexual activity. Are you personally familiar with the attitudes and norms of the homosexual community?"
>
> "122. Do you believe your experience is inadequate to judge the appeal of these films to homosexuals unless expert testimony is presented?"
>
> "102. Do you feel the availability in the community of sexually explicit or graphic materials is on the increase or the decrease?"
>
> "103. Does this fact disturb or offend you?"

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[2]"C.T." refers to the Clerk's Transcript of the Record on Appeal, "Vol." refers to the Volume number, and "Doc." refers to the Document Number.

"105. Have you ever known of anyone to have been harmed or hurt in any way by exposure to sexually explicit or graphic materials?"

"111. Will you be able to view films which depict certain sexually explicit activities, including mouth and genital contact, anal intercourse, ejaculation, homosexual activity and interracial sex with open eyes and an open mind?"

"119. What organizations do you belong to in the community?"

C. Midway through the trial the five allegedly obscene films were projected for the jury. At the conclusion of the third film shown the jury, petitioner brought to the Court's attention that Juror Kohring was not viewing the films but had been reading a magazine during the screening. The judge directed him to put away the magazine. Thereafter, Kohring did not view much of the fourth film shown. At that time petitioner's counsel wrote a note to FBI Agent Hod Hunt asking him to observe whether Kohring was watching the fifth film during its screening. Mr. Hunt was instructed not to make this observation by Assistant United States Attorney John Lund and, accordingly, Hunt averted his eyes from the jury box during the showing of this final film. Again, Kohring did not view the screen for more than seconds at a time. (R.T. Vol. 8 at D-123 to D-129.) News personnel in attendance at the trial observed juror Kohring avert his eyes and so reported it. See Affidavit of W. Michael Mayock and newspaper clippings and note to Hunt appended thereto. (C.T. Vol. 2, Doc. 51.)

Petitioner made a motion to replace Kohring with an alternate juror. The court rejected this request saying

Kohring had paid sufficient attention and intimated the jury would screen the films in the jury room during deliberations. Significantly, the jury had no projector in the jury room and so did not see the films again. (R.T. Vol. 11 at G-229.)

D. At the inception of the trial attorney Zell represented co-defendants Grassi and Sanders. Midway through the trial, Grassi, still represented by Zell, entered into a plea agreement with the prosecution on the condition that he testify at trial. Grassi thereafter obtained a new counsel, Hall, who advised him not to waive his attorney-client privilege with Zell since Hall had ascertained from Grassi that Zell could impeach Grassi with other crimes Grassi had confidentially communicated to Zell. At a hearing Grassi advised he would testify if Walter's case were severed from Sanders'. His testimony would have been exculpatory of Walter on the *scienter* issue in that petitioner did not knowingly transport the films by *common carrier* (R.T. Vol. 4 Supp. at 23) and did not know the "nature, character and contents" of the films. (R.T. Vol. 8 at D-10; Vol. 9 at E-3, E-5, E-9, E-117 to E-121.)

Petitioner was prejudiced not only in being tried with Sanders but with Sanders' lawyer as well. Zell was shown to have advised one witness, Maxey, to "take the Fifth" Amendment before the Grand Jury (R.T. Vol. 9 at E-93 to E-94) and to have prepared Government's Exhibit 13 (Appendix E hereto), a letter Zell wrote to an accountant attributing ownership of certain defendant corporations to defendants Grassi and Sanders which the Government contended was false. Petitioner sought unsuccessfully to have a hearing

on Zell's obvious conflicts of interest one month in advance of trial. (C.T. Vol. 2, Doc. 39 at 2.)

E. Viewing the trial evidence in the light most favorable to the Government, there was evidence that petitioner and defendant Sanders were partners who jointly operated an extensive network of adult cinemas, bookstores and distribution warehouses. Defendant Sanders and all other defendants, with the exception of petitioner, were shown to have authorized the shipment of 871 8mm films which culminated in the indictment at bar. There was no evidence that petitioner had ever seen these films or had any knowledge of their nature, character or contents. There was no evidence petitioner exercised any role in the business within either two months before or after the shipment of film. Finally, there was no evidence that any other shipment made by the business contained obscene material.

F. Petitioner proffered at least five jury instructions which sought to have the term "average person" in the obscenity formulation defined as "average adult." (C.T. Vol. 2, Doc. 45.) For example, proposed instruction No. 22 read in pertinent part:

> "The term 'average adult person' as used in these instructions is a hypothetical composite person who typifies the entire community including persons of both sexes . . . .
>
> "'Adult' means all persons of age of 18 or older."

The trial judge refused to give a charge defining "person" as "adult." The court likewise declined petitioner's proffered instruction No. 48 that if "the jury is unable

to ascertain the meaning of 'the average adult person,' or of 'contemporary community standards' . . . then the Government has failed to prove its case beyond a reasonable doubt." Petitioner had sought to develop on cross-examination of the Government's expert witness that certain terms used in the obscenity test, such as "the average person," were incapable of ascertainment. It was suggested that because that term is in the singular and includes men *and* women, then of necessity "the average person" must be a transsexual.

Petitioner asked the court to give the following instruction:

> "The predominant appeal to prurient interest is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group."

Instead, the court delivered this charge:

> "In addition to considering the average or normal person, the prurient appeal requirement may also be assessed in terms of the sexual interest of a clearly defined deviant sexual group if you find, *beyond a reasonable doubt,* that the material was intended to appeal to the prurient interest of such a group as, for example, homosexuals." (Emphasis added.)

G. Trial commenced on August 10, 1977, and on August 19, 1977, the jury rendered a verdict finding petitioner guilty on all eleven counts. (R.T. Vol. 11

at G-231.) On October 21, 1977, the Honorable Wm. Terrell Hodges, United States District Judge, after denying petitioner's motions for a new trial and for judgment of acquittal, sentenced petitioner to concurrent three year terms of imprisonment on all counts. That same day petitioner filed a timely Notice of Appeal (C.T. Vol. 2, Doc. 59) and was allowed to remain on $25,000 corporate surety bail pending the outcome of his appeal. Petitioner duly filed his appellate briefs in the Court of Appeals. The judgment of the District Court was affirmed on April 2, 1979. A timely petition for rehearing with suggestion for determination en banc was denied on June 15, 1979. An order staying the issuance of the mandate was granted on June 22, 1979, provided a petition for writ of certiorari is filed in the clerk's office of this Court on or before July 15, 1979.

REASONS FOR GRANTING THE WRIT.

1. The FBI's acceptance from a third party of films wrongfully within that party's possession was a "seizure" subject to the warrant requirement of the Fourth Amendment, or alternatively, whether the rule fashioned in *Burdeau v. McDowell,* 256 U.S. 465, fifty years ago requires a two-step analysis of the "seizure"—that by the third party and that of the government—where First Amendment concerns are involved as has been held by the Eighth Circuit but not by the Fifth or Ninth Circuits.

More than fifty years ago in *Burdeau v. McDowell,* 256 U.S. 465, 475, the Supreme Court held "that papers stolen by a thief and turned over to the government could be used as evidence at trial. The Court did not explicitly consider whether the government's acceptance of the papers was a seizure."[3] However, when First Amendment concerns are at stake "the most scrupulous exactitude" must be given the constitutional requirements of the Fourth Amendment. *Stanford v. Texas,* 379 U.S. 476, 485. The First Amendment operates as an independent source of restrictions upon the power of the police to take expressive material since a prompt judicial determination in an adversary setting is mandated to obviate prior restraint problems. *Heller v. New York,* 413 U.S. 483, 495. . . . Where, as here, the government acquires films which are the product of a third party search and fails to observe the minimum procedural safeguards prescribed by the Supreme Court the acquisition must be deemed a "seizure" both because it is a deprivation of a legitimate property interest (see *Rakas v. Illinois,* 439 U.S. 128) and

[3]Dissenting opinion of Judge Wisdom.

because it operates as a prior restraint which upsets reasonable expectations that the property would be subject to prompt judicial return (*Heller, supra*) or would remain private. In short, where First Amendment concerns are involved a two-step analysis of the "seizure" must be made—that by the third party and that of the government—and *Burdeau* applies only in the absence of an independent governmental invasion of privacy rights protected by the Fourth Amendment. The majority opinion of the panel failed to discuss this issue.

As Judge Wisdom's dissent incisively demonstrated, the *Burdeau* rule is an anachronism discredited by commentators.[4] Its functional twin the "silver platter" doctrine was discarded nearly twenty years ago. *Elkins v. United States,* 365 U.S. 206. Developments in Fourth Amendment doctrine have undercut the practical function of *Burdeau* which was decided when there were few justifications for warrantless seizures. Today our society is expanding, not contracting, its legitimate expectations of privacy. Although *Rakas v. Illinois,* 439 U.S. 128, disapproves "arcane distinctions developed in property . . . law," under *Burdeau* a "seizure" is determined by the *status* of the trespasser—official versus private. It is difficult, if not impossible, to reconcile *Burdeau* with *Shelley v. Kraemer,* 344 U.S. 1 (1948) which held the "state action" doctrine forbids judicial support of certain private acts which, if carried out by government would be unconstitutional. In sum, some flexibility in *Burdeau* is required to accommodate

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[4]See, *e.g.,* Note, *Private Searches and Seizures,* 90 Harv. L. Rev. 463 (1976); Note, *The Fourth Amendment Right of Privacy: Mapping the Future,* 53 Va. L. Rev. 1314, 1336-59 (1969); Note, *Seizures by Private Parties: Exclusion in Criminal Cases,* 19 Stan. L.Rev. 608 (1967).

reasonable modern expectations of privacy, particularly where they intersect First Amendment values.

The Eighth Circuit in *United States v. Kelly,* 529 F.2d 1365 (8th Cir. 1976) concluded that where a common carrier delivers to the government First Amendment materials uncovered during a private search, the government's acceptance of said items constitutes a "seizure" requiring a warrant. The majority of the panel refused to follow *Kelly* and instead erroneously followed *United States v. Sherwin,* 539 F.2d 1 (9th Cir. 1976) (*en banc*) which concluded under similar facts that there was no "seizure." The brilliant dissenting opinion of Judge Wisdom and Note, *Private Searches and Seizures, United States v. Kelly and United States v. Sherwin,* 90 Harv. L. Rev. 463 (1976) both comprehensively analyze these two cases and conclude without reservation that the approach of *Kelly* is preferable to that of *Sherwin* in accommodating both First Amendment rights and the privacy interests of absent third parties.

A. Every action undertaken by the shippers of the films was consistent with an expectation of privacy. The twelve boxes of film were double-wrapped and reenforced to prevent accidental breakage while in transit. *Previous shipments* of film directed to "Leggs, Inc." on a "Will Call" basis *had not been reforwarded* to a Greyhound substation and *"L'Eggs Products, Inc." had not been contacted.* It was reasonable to expect that no one would both claim shipped packages which did not belong to them and then pay the collect charges on those items. Moreover, it was reasonable to assume that Greyhound would not release the shipped cartons to someone who claimed no interest in them and refused

to pay the collect shipping charges due. The employment of a fictitious name on the shipment bills of lading was an earnest attempt to ensure privacy since common carrier pilferage or breakage occurs frequently, as several witnesses testified, when the name of a known adult entertainment business is used on the bill of lading.[5] Also the assiduous attempts of the shippers to locate their misdirected shipment is demonstrative of their expectation that the merchandise would remain private. Finally, where the "contraband" involved is 8mm films—the indictment did not charge the film box covers with being obscene—the expectation of privacy is at its greatest since (1) the films are presumed legitimate in the absence of a judicial determination to the contrary and (2) *the film frames are too small to be seen without the aid of a projector. Roaden v. Kentucky,* 413 U.S. 496 (1973); *Lee Art Theatre, Inc. v. Virginia,* 392 U.S. 636 (1968). In fact, the FBI chose not to screen the films for *two months* after their seizure, although they knew appellants were seeking to retrieve their merchandise and even then maintained a reasonable expectation that the films would remain private and would not be viewed by others. See *United States v. Haes,* 551 F.2d 767 (8th Cir. 1977); *United States v. Kelly,* 529 F.2d 1365, 1368 (8th Cir. 1976).

B. The Government, relying heavily on *United States v. Sherwin,* 539 F.2d 1 (9th Cir. 1976) (en banc) has contended that its acquisition of the films in issue did not fall within the scope of the Fourth

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[5]Within a two month period one adult bookstore had *seven* separate interstate shipments addressed to it as consignee rip open "inadvertently." *United States v. Kelly,* 529 F.2d 1365, 1368 (8th Cir. 1976).

Amendment since there is no "seizure" if property is consensually transferred by a third party to the Government. Alternatively, the Government advanced the third party consent exemption to the warrant requirement of the Fourth Amendment as justification for its seizure of the films. Neither theory has factual underpinning.

Admittedly, employees of L'Eggs Products, Inc. (LPI) voluntarily contacted the FBI to inquire as to what they should do with the misdirected shipment of films in their possession. FBI Agent Mandyck, knowing the shipment was "misdirected" and, accordingly, not rightfully within the possession of LPI, *instructed* LPI to secure the films in a safe place until the FBI could come by and pick them up. (R.T. Vol. 1 Supp. at 170-71, 107, 133.) However, a "seizure" is not complete until there is an effective appropriation (*Lustig v. United States,* 338 U.S. 74, 78) and the FBI waited five days to appropriate the films. During this hiatus, LPI denied having the films to defendant Grassi, thereby demonstrating their subservience to the government. (R.T. Vol. 4 Supp. at 8-9.) Also Greyhound employee Askew testified he did not tell defendants the whereabouts of the films *per FBI instructions* and Agent Mandyck admitted telling Askew to get the names and phone numbers of those seeking to retrieve the films. (R.T. Vol. 1 Supp. at 50-52, 207-08.) The only rational conclusion that may be drawn from the aforesaid facts is that LPI and Greyhound employees were not acting voluntarily but rather under the command and at the direction of the FBI and that the FBI, knowing the films were wrongfully acquired by LPI, participated in and encouraged their

theft. It is only "[w]here no official of the federal government has any connection with a wrongful seizure or any knowledge of it until after the fact, [that] evidence is admissible." *United States v. Mekjian,* 505 F.2d 1320 at 1327 (5th Cir. 1975). Thus, there was neither a voluntary relinquishment of the films to the FBI nor was there an absence of governmental participation in an illegal seizure.

The Government's suggestion that the FBI acquired the subject films pursuant to a valid third party consent is unsupportable. LPI employees admitted LPI had no entitlement to the packages, the films were taken without paying the freight charges and the cartons were not addressed to LPI. Moreover, Agent Mandyck knew the films were "misdelivered" and retained for five days by LPI while the defendants sought to regain their merchandise. Obviously, the actions of defendants in attempting to retrieve their films were indicative of the fact that *no consent* had been given to LPI to relinquish the films to the FBI. Indeed, if LPI had authority over the films it was clearly lost during the five day interval between the time the FBI was contacted and the time it picked up the films.

C. The majority opinion claims that the acquisition of the twelve cartons of film by the FBI from LPI was not a "seizure" under the holding of *Sherwin, supra,* since it was the product of a voluntary relinquishment. This holding of *Sherwin* is not without detractors. *McSurely v. McClellan,* 553 F.2d 1277 (D.C. Cir. 1976) (en banc); *United States v. Kelly,* 529 F.2d 1365 (8th Cir. 1976); *United States v. Haes,* 551 F.2d 767 (8th Cir. 1977); *Private Searches and Seizures: United States v. Kelly and United States v. Sherwin,* 90 Harv. L. Rev. 463 (1976).

"Placing the Government's acceptance of printed materials outside Fourth Amendment constraints allows for the possibility of Government sanctioned private censorship without judicial supervision," "might deter the dissemination of legitimate expression via interstate common carriers," and "presents a problem of prior restraint." 90 Har. L. Rev. at 467. All of the concerns expressed above were set in motion in the case at bar when LPI turned over to the FBI the cartons of film it wrongfully withheld from defendants. "Cooperation of a custodian without authority to grant access may obviate use of force, but it does not validate an otherwise unlawful search and seizure." *McSurely v. McClellan,* 553 F.2d 1277, 1291 (D.C. Cir. 1976) (en banc).

The Harvard Law Review article in finding the approach of *Kelly* preferable to that of *Sherwin* criticizes the absolutist scope of the *Burdeau v. McDowell* exemption, concluding that developments in Fourth Amendment doctrine have undercut the practical function of *Burdeau.* Furthermore, the article characterizes the government's conduct in *Kelly* and *Sherwin* as a "seizure" because it constituted a deprivation of the defendants' property interests. These property interests help define the scope of the right to privacy and must be presumed legitimate where First Amendment material is involved. Accordingly, the Government's appropriations in *Kelly, Sherwin* and the case at bar were "seizures." 90 Harv. L. Rev. at 467-72.

2. The FBI's screening after a two-month hiatus of films received from a third party who had not viewed the films constituted both a "secondary search" subject to the warrant requirement of the Fourth

Amendment as had been held in a similar case by the Eighth Circuit as well as a "search" within the teaching of *United States v. Chadwick,* 433 U.S. 1.

After obtaining the subject 8-mm films from L'Eggs Products, the FBI waited two months to screen the films to ascertain what they had. The individual frames of 8-mm film were too small to be seen with the naked eye. Although the box covers for the films purported to describe in graphic fashion the content of the respective films, the box covers were entitled to a presumption of non-obscenity (*Roaden v. Kentucky,* 413 U.S. 496), were never charged as being obscene and, moreover, did not present probable cause for the issuance of a warrant. *United States v. Tupler,* 564 F.2d 1294 (9th Cir. 1977).

In *United States v. Haes,* 551 F.2d 767 (8th Cir. 1977), the FBI, having been contacted by a common carrier who had discovered sexually explicit films and having brought a projector to the common carrier's office where they screened the films without first obtaining a warrant, was held to have conducted a separate, independent search which was illegal since no exception to the warrant requirement existed. The majority opinion of the panel purports to distinguish *Haes* by declaring that L'Eggs employees had fully ascertained the nature of the *films even though they had never screened them.* Therefore, the majority concludes, "the FBI's subsequent viewing of the movies on a projector did not 'change the nature of the search' and was not an additional search subject to the warrant requirement." It is obvious that the FBI both changed the nature of the search and conducted an additional search when they projected films that had never been viewed

by L'Eggs employees. *A fortiori,* the two-month hiatus between acquisition and screening negated the possibility that one continuous search transpired.

The majority opinion also attempts to distinguish *United States v. Chadwick,* 433 U.S. 1 (1977) by declaring that "the FBI took control of property that had already been searched by a private party and did not conduct any additional search of its own requiring a warrant." This argument is flawed for the same reasons set forth above. Moreover, this interpretation of *Chadwick* would emasculate the decision. In *Chadwick* a *one-hour* delay in conducting a warrantless search of a footlocker for drugs was held to be too long. How can it possibly be said that a *two month* delay in conducting a warrantless search of presumptively protected First Amendment material was not too long?

A. Assuming, *arguendo,* that LPI validly consented to the FBI's *seizure* of the subject films, there was no consent to the FBI's *search* of the films which occurred when they were screened two months later. Neither the FBI nor anyone at LPI knew the contents of the films since the 8mm film frames could not be seen with the naked eye. (R.T. Vol. 1 Supp. at 65, 119, 137, 155.) In addition to not being charged as being obscene, the film box covers did not present probable cause for one to entertain the belief that the films were obscene. *United States v. Tupler,* 564 F.2d 1294, 1297-98 (9th Cir. 1977). However, during the two-month period prior to the screening of the films the FBI was cognizant that defendants were seeking the return of their films. Accordingly, any *imputed* consent must be deemed *revoked. Mason v. Pulliam,*

557 F.2d 426 (5th Cir. 1977) (taxpayer who consented to IRS possession of his papers for examination may withdraw his consent and reinvoke his Fourth Amendment rights as to all papers not then viewed or copied). Employing the logic of *Mason* to the case at bar it is clear the FBI viewed the films without the defendants' consent and that search is properly a subject of suppression.

B. If the Government undertakes any new or different searches after being apprised that contraband has been unearthed in a private search, then a warrant is required unless an exception to the warrant requirement exists. *United States v. Haes,* 551 F.2d 767, 771 (8th Cir. 1977).

The opening of the film boxes by FBI agents and their unsuccessful attempt to "eye view" the contents of one of the 871 films at LPI places the government outside the scope of *Sherwin,* since there "[w]hen the agents arrived they did not conduct a more extensive search." *Sherwin, supra,* at 6-7. There is only *one chance* in 871 that the FBI did not conduct a more extensive search. Those are the odds against the FBI selecting the same film to "eye view" as did LPI employee Shults. Moreover, only five of the 25 different film titles were charged with being obscene. There was only a 20 percent chance that a charged film was "eye viewed."

C. The FBI's subsequent screening of films it received from LPI constituted a "search" prohibited in the absence of a warrant by the Fourth Amendment. Common sense dictates that this be so. Until the films were projected on a screen there was *no probable*

cause to believe a crime had been committed,[6] so how could the viewing of the films not be a "search"?

In both *United States v. Sherwin,* 539 F.2d 1 (9th Cir. 1976) (en banc) and *United States v. Kelly,* 529 F.2d 1365 (8th Cir. 1976) FBI agents simply reinspected magazines and books which had already been examined by freight agents. Significantly, in the case at bar the film box covers were not charged with being obscene and the film could not be "eye viewed." Therefore the FBI, unlike the situation in *Sherwin* and *Kelly,* was unable to judge the material either taken as a whole or at all for that matter. In screening the films the FBI engaged in a secondary search similar to the one condemned in *United States v. Haes,* 551 F.2d 767, 771 (8th Cir. 1977). If anything, however, the instant search was more unreasonable since the Government never attempted to obtain a warrant, conceded there were no exigent circumstances, held the films for two months before viewing them and confessed that a warrant could have been obtained had one been sought.

Even if *Sherwin* is accepted as the controlling authority on the "seizure" issue, it does not mean the FBI's subsequent screening of the films was not a "search" governed by the Fourth Amendment. More exacting standards apply to searches and seizures of First Amendment-protected materials than to narcotics, gambling paraphernalia and other contraband. *Roaden*

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[6]The box covers for the film were entitled to a presumption of non-obscenity (*Roaden v. Kentucky,* 413 U.S. 496 (1973)), were not charged as being obscene and did not present probable cause for the issuance of a warrant. (*United States v. Tupler,* 564 F.2d 1294 (9th Cir. 1977).) The film itself could not be seen with the naked eye.

v. Kentucky, 413 U.S. 496 (1973); *Stanford v. Texas,* 379 U.S. 476 (1965); *A Quantity of Books v. Kansas,* 378 U.S. 205 (1964). Also Fourth Amendment "search" and "seizure" issues are appropriately subjected to bifurcation. For example, in *United States v. Chadwick,* 433 U.S. 1 government agents had probable cause to believe defendants' footlocker contained contraband and, accordingly, they seized it at the time they arrested the defendants, but delayed their search of the luggage for *one hour* after the seizure. Since the police seizure was incident to an arrest it was exempt from the Fourth Amendment warrant requirement. The delayed warrantless search of the footlocker, however, did not fall within the compass of any recognized exception to the warrant requirement and was held constitutionally defective.

The lesson of *Chadwick* is instructive in the instant case. A sealed box of film is like a sealed trunk. It is immaterial that a Government acquisition be deemed a voluntary relinquishment or a consent seizure or a seizure incident to arrest, in all cases a warrant to seize is not mandated. But a warrantless search of the acquired items which contain potential contraband may not be delayed unless a search warrant is first obtained. In postponing their search of the subject films for two months, the FBI lost any possible exemption from the search warrant requirement of the Fourth Amendment it might have asserted. Therefore the search was illegal.

3. The Government by appropriating presumptively protected First Amendment material received from a third party for one and one-half years without requesting a judicial determination of the obscenity *vel non* of said material committed a prior restraint the penalty

for which is suppression of the materials' use in a criminal trial in accordance with the provisions of the First, Fourth and Fifth Amendments to the Constitution and the interpretive decisions of this Court.

There exist a plethora of cases that restrict the Government's possession of another's First Amendment materials to situations where a prompt adversary hearing is available so that prior restraint will not occur. *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975); *Roaden v. Kentucky,* 413 U.S. 496 (1973); *Heller v. New York,* 413 U.S. 483 (1973); *Blount v. Rizzi,* 400 U.S. 410 (1971); *Lee Art Theatre, Inc. v. Virginia,* 392 U.S. 636 (1968); *Freedman v. Maryland,* 380 U.S. 51 (1965); *Stanford v. Texas,* 379 U.S. 476 (1965); *A Quantity of Books v. Kansas,* 378 U.S. 205 (1964); *Marcus v. Search Warrant,* 367 U.S. 717 (1961); *Speiser v. Randall,* 357 U.S. 513 (1958).

In its second opinion filed June 15, 1979, the majority of the panel cite a number of lower court decisions which hold that when materials are seized in violation of the First Amendment, the appropriate remedy is return of the seized property, but not its suppression as evidence at trial. The cases cited involve the seizure of expressive matter pursuant to warrant but without an adversary hearing. Clearly the case at bar is distinguishable from these cases not only in that no warrant was involved but also importantly, in that the government held the appropriated materials for one and one-half years before an indictment was returned. In footnote seven of his dissent Judge Wisdom suggests that "*Heller* and *Roaden* may obliterate any distinction between violations of the First and Fourth Amendments when a seizure of expressive matter is defective for

lack of a determination of probable obscenity by a neutral magistrate."

It also appears that no court has ever considered whether suppression of evidence is an appropriate remedy for a prior restraint under the Due Process Clause of the Fifth Amendment. Yet this Court in *United States v. Russell,* 411 U.S. 423, 431-32, stated, "[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin v. California,* 342 U.S. 165 (1952). . . ." It is submitted that the massive nature of the seizure herein (871 films were taken), the fact only five of the twenty-five film titles were ever charged with being obscene, the government's knowledge that defendants were seeking return of their property, the failure of the government to give either direct notice to petitioner that it had his property if he wished to claim it or to place a notice of seizure in a newspaper of general circulation (*cf. Sniadach v. Family Finance Corporation,* 395 U.S. 337; *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306), and the government's failure to seek an obscenity *vel non* determination from a neutral magistrate during a two-year period manifest the government's intention to impose nonjudicial suppression of a citizen's presumptively protected First Amendment property without affording the citizen the niceties of procedural due process. The result, particularly when coupled with First and Fourth Amendment considerations earlier addressed, is shocking to the conscience and in violation of due process under the Fifth Amendment. The suppression of the appropriated films as evidence is a just and proper remedy under the circumstances of this case.

4. In an obscenity prosecution *derivative* proof of scienter solely through evidence of petitioner's participation in a management role in a presumptively legal business venture which shipped numerous films, and without any further proof that he knew of or authorized the solitary shipment of films charged as being obscene, deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution and the interpretive decisions of this Court.

The Circuit's opinion erroneously equates an individual's *agreement* to participate in a presumptively legal business venture with guilty *knowledge* of a solitary criminal violation occurring in the course of the operation of that business by others. "In general an individual defendant may be criminally liable on the basis of an act or omission of another person, only if it appears beyond reasonable doubt that he willfully ordered or directed, or willfully authorized or consented to, *the act* or omission *in question*." Devitt & Blackmar, *Federal Jury Practice and Instructions,* Vol. 1, § 12.09 (1977) (emphasis added). There is *NO* evidence that petitioner ordered, directed, authorized or consented to "the act in question" (the September 25, 1975, interstate shipment of obscene films) since all evidence touching upon him dealt with time frames either *two months before or two months after* the shipment date. Instead, the evidence shows other defendants directed the shipment in question.

The evidence recounted in the Circuit's opinion shows at most petitioner's involvement in a legal enterprise

which dealt in all situations except the one at bar in material presumptively protected by the First Amendment.[7] *Roaden v. Kentucky,* 413 U.S. 496. It strains credulity to suggest this evidence and nothing more proved beyond a reasonable doubt that on September 25, 1975, petitioner: (1) *Knew* "the contents, character and nature" of the subject films he was never shown to have seen (*Hamling v. United States,* 418 U.S. 87, 123); (2) *Knowingly* used a common carrier to ship these obscene materials interstate; and (3) *Knowingly* transported these obscene materials interstate for the purpose of sale or distribution. The panel's determination that scienter in First Amendment cases may be proved derivatively by a pattern of non-criminal activity removed in time from the incident charged vitiates the scienter requirement spelled out by this Court. *Hamling, supra; Smith v. California,* 361 U.S. 147 (1959).

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[7]It is patent that in calculating whether obscenity exists the material must be taken as a whole (*Miller v. California,* 413 U.S. 15) and an individual's subjective belief in the obscenity of material is irrelevant. (*Clicque v. United States,* 514 F.2d 923 (5th Cir. 1975).) The recitation of testimony relating to the contents of warehouses and bookstores is irrelevant since such material cannot be seen as a whole (*United States v. Tupler,* 564 F.2d 1294 (9th Cir. 1977)), nor can it be known to have traveled in interstate commence at the direction of defendants herein, nor can it be known whether said material is hard-core or soft-core. Indeed, under the law it must be *presumed* that such material is *not* obscene. *Roaden v. Kentucky,* 413 U.S. 496. Accordingly, there can be *no conspiracy with regard to such material not before the court* since a conspiracy involves an agreement to commit an illegal act, and there is nothing illegal about material presumptively protected by the First Amendment. Therefore, the conspiracy charge as to petitioner (and, of course, as to the other defendants) rises or falls on whether he (or they) can be tied to the September 25, 1975, shipment of twelve cartons of film, which is the only "object" of the conspiracy it is permissible to consider.

5. In an obscenity prosection the refusal of the district court to instruct the jury that in calculating the more of the community the term "average person" means "average adult" violated the teaching of *Pinkus v. United States,* 436 U.S. 293, that the community includes all adults who comprise it since "person" subsumes the class "children" and the instruction therefore deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution.

Appellants submitted at least five jury instructions seeking to have the court define "average person" as meaning "average adult." *Pinkus v. United States,* 436 U.S. 293 said the community includes all adults who comprise it and "it was error to instruct the jury that [children] were a part of the relevant community." By failing to instruct the jury to consider only "adults" in calculating the composition of the contemporary community, the trial judge left open for the jury's speculation whether "person" included "children." Anyone who understands the English language recognizes that "children" are subsumed within the class "person." Accordingly, if the jury failed to include children as part of the contemporary community, they would have to have disobeyed the court's instructions. It is more likely than not that the jury followed the trial judge's directives. In doing so they necessarily considered "children" as part of the community and thereby rendered a verdict which must be struck down for the reasons set forth by this Court in *Pinkus.*

The panel's opinion quotes from instructions using the words "average person" and "average and normal attitude toward, and an average interest in, sex" and

contends that these words limited consideration to adults. That is not the case, however. Taken in context what the quoted instructions did was to differentiate the non-deviant community from the deviant community. Moreover, even if the panel's viewpoint is accepted as correct, the instructions make it possible for a jury to conclude that the "average person" has some of the attributes of a child. This is exactly what was condemned in *Pinkus*. More significantly, even if a jury could have concluded that "person" meant "adult," it cannot be certain that this is what it *did* do since its verdict was a general one. *Sandstrom v. Montana,* ..... U.S. .....

6. In an obscenity prosecution involving films of an exclusively homosexual orientation an instruction foreclosing jury assessment of the prurient appeal, if any, of the films to homosexuals absent proof *beyond a reasonable doubt* that the films were intended to appeal to the prurient interest of homosexuals deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution and the interpretive decisions of this Court.

The opinion of the Circuit omitted entirely a discussion of the manifestly erroneous jury instruction which directed that prurient appeal be measured by the standards of the average person when the films were clearly directed to a deviant group. *A fortiori,* the instruction given precluded any consideration whether the films had a prurient appeal to members of the homosexual community.

All the subject films depicted male homosexual conduct exclusively and it was undisputed that the *intend-*

ed and probable recipients of the films were homosexuals. The court, over objection, instructed in essence that prurient appeal is to be judged with reference to the average person instead of only to members of the intended deviant recipient group contrary to the teaching of *Mishkin v. New York,* 383 U.S. 501, and *Pinkus v. United States,* 436 U.S. 293 (error to include children as part of community for purposes of determining prurient appeal unless children shown to be intended and probable recipients). The court admonished the jury that *before* pruriency could be assessed in terms of sexual interest of the intended and probable recipients of the films, *i.e.,* homosexuals, there must be *proof beyond a reasonable doubt* that the films were "*intended to appeal to the prurient interest*" of homosexuals.[8] Whether the maker of the films *intended* them to appeal to the prurient interest of homosexuals is not only irrelevant but impossible to ascertain. Accordingly, since such an intent could not be proved beyond a reasonable doubt, the jury was foreclosed from assessing whether the films appealed to the prurient interest of members of the homosexual community. The consequence of requiring proof of intent beyond a reasonable doubt "was to unconstitutionally shift the burden of persuasion to petitioner such as was done in *Mullaney v. Wilbur,* 421 U.S. 684." See *In re Winship,* 397 U.S. 358, 364.

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[8]The court instructed as follows:

> "In addition to considering the average or normal person, the prurient appeal requirement may also be assessed in terms of the sexual interest of a clearly defined sexual group if you find, beyond a reasonable doubt, that the material was intended to appeal to the prurient interest of such a group as, for example, homosexuals."

7. A juror who read a book and frequently stared at the floor on the sole occasion when the allegedly obscene films were screened for the jury was either incompetent to render a judgment regarding the obscenity *vel non* of the films which must be "*taken as a whole*" under the directive of *Miller v. California,* 413 U.S. 15, or so prejudiced against the defense that petitioner was deprived of freedom of speech and press, due process of law, and an impartial jury, contrary to the provisions of the First, Fifth and Sixth Amendments to the Constitution.

There is substantial evidence that Juror Kohring was reading a magazine and staring at the floor during much of the time when the five films in question were screened in court for the jury. It was the only occasion on which the jurors saw these films.

Under the facts presented a magistrate seeing only what Kohring saw would not have *probable cause* to issue a warrant to seize the film. *United States v. Tupler,* 564 F.2d 1294, 1297-98 (9th Cir. 1977). This is because *Miller v. California,* 413 U.S. 15, requires that a film be taken *as a whole* with regard to application of the third prong value test of the obscenity formulation. If Kohring did not have probable cause to believe the films obscene, then *a fortiori* he could not have found them obscene *beyond a reasonable doubt* and petitioner was deprived of his Fifth Amendment rights.

Juror Kohring was *incompetent* to render a judgment regarding the obscenity *vel non* of the films. Moreover, Kohring should have been replaced by an alternate juror who was not so obviously *prejudiced* against the defense since petitioner was entitled under the Sixth Amendment to an *impartial* jury.

8. In an obscenity prosecution involving films of an exclusively homosexual orientation the refusal of the district court to *voir dire* the veniremen concerning their length of residence in the community, participation in community organizations, knowledge of community standards from the standpoint of personal exposure, knowledge of the mores, customs and practices of the homosexual community and opinion whether sexually explicit matter causes harm negated the mandate of *Smith v. United States,* 431 U.S. 291, that a defendant be given reasonable latitude in presenting *voir dire* questions to the veniremen and, accordingly, deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution.

The trial court erred in failing to ask the requested *voir dire* questions propounded by petitioner particularly as they related to the jurors' length of residence in the community, participation in community organizations, knowledge of community standards from the standpoint of personal exposure (since comparison evidence was not allowed to be introduced), opinion as to whether sexually explicit matter causes harm, their knowledge of the mores, customs and practices of the homosexual community and their opinion whether sex-questions to the veniremen. *Smith* leaves the decision *States,* 431 U.S. 291, 308, mandates that a defendant be given reasonable latitude in presenting *voir dire* questions to the veniremen, *Smith* leaves the decision of the propriety of a particular question to the discretion of the trial court. It must be noted the trial herein occurred in Florida at the time of Anita Bryant's Crusade. It was therefore especially important to peti-

tioner to obtain answers from the jurors to specific and focused questions dealing with their beliefs, experiences and prejudices. The *voir dire* questions submitted to the trial court by petitioner were the very sort of questions *Smith* indicated were proper. The failure of the court to ask these proffered questions of the veniremen undoubtedly prejudiced petitioner. Perhaps if the Court had allowed Appellant Walter's Requested *Voir Dire* Question 111 ("able to view . . . *with open eyes* and an open mind.") (C.T. Vol. 2, Doc. 45 at 14), the Kohring incident would not have happened.

9. Due process of law under the Fifth Amendment required that petitioner's case be served from co-defendant Sanders' so that co-defendant Grassi, who had entered a guilty plea during trial, could testify to exculpate petitioner and inculpate Sanders on the scienter issue, which Grassi had indicated he would do but not unless there were a severance since his former attorney was counsel for co-defendant Sanders and could impeach Grassi with other crimes Grassi had confidentially communicated to him if Grassi waived his attorney-client privilege and testified in favor of petitioner and against co-defendant Sanders.

At least five grounds necessitated the severance of petitioner's case from that of defendant Sanders. First, Sanders was the subject of much adverse pre-trial publicity. Second, trial testimony depicted Sanders as having threatened a witness. Third, hearsay statements by Sanders were improperly admitted against Walter, contrary to *Bruton* requirements. Fourth, Sanders was represented by an attorney who told a prosecution witness to "take the Fifth Amendment"

and who drafted a Government trial exhibit which the Government contended was false. Fifth, had there been a severance co-defendant Grassi would have testified without fear of impeachment by his former attorney Zell to exculpate Walter on the *scienter* issue regarding his knowledge of the shipment and the character of its contents *prior* to its misdelivery. Each of the aforesaid grounds would warrant a severance; collectively, they cry out for it. A severance should have been granted under Rule 14, Fed. R. Crim. P., since petitioner's joint trial with defendant Sanders and his counsel was so prejudicial that it was a clear abuse of discretion not to grant a severance. See, *e.g., United States v. Marshall,* 532 F.2d 1279 (9th Cir. 1976).

10. The refusal of the district court to give petitioner's proffered jury instruction on his theory of the case developed through cross-examination that certain terms in the obscenity formulation were incapable of calculation deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution and the interpretive decisions of this Court.

One defense theory in the case was that certain terms in the obscenity formulation were incapable of ascertainment. For example, the defense contended both during cross-examination and final argument that it is impossible to calculate "the average person" and because that term is in the singular and includes men *and* women, then of necessity "the average person" must be a transsexual. "The average person" differs from "the average reasonable man" of tort law not only because the term is a logical impossibility, but

also because it must be proved beyond a reasonable doubt instead of by a preponderance of the evidence.

When a defendant requests an instruction on a particular defense theory, he is entitled to receive it unless it is unsupported by the evidence. *United States v. Alfonso-Perez,* 535 F.2d 1362, 1365 (2d Cir. 1976) (because cross-examination provided sufficient basis for defense theory, failure to instruct was error); *United States v. Levy,* 578 F.2d 896, 903 (2d Cir. 1978). In the case at bar defendants' cross-examination of the prosecution's expert witness directed itself at the impossibility of calculating "the average person." Therefore, defendants were entitled to their requested instruction on a defense theory of the case.

Conclusion.

For the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

W. MICHAEL MAYOCK,

Attorney for Petitioner.

APPENDIX A.

Opinion of the Court of Appeals.

United States Court of Appeals, Fifth Circuit.

United States of America, Plaintiff-Appellee, v. Arthur Randall Sanders, Jr., Gulf Coast News Agency, Inc., Trans World America, Inc., a/k/a TWA, Inc., and William Walter, Defendants-Appellants. No. 77-5715.

April 2, 1979.

The United States District Court for the Middle District of Florida, Wm. Terrell Hodges, J., convicted defendants of conspiracy, knowingly using common carrier to ship obscene materials interstate, and knowingly using common carrier to transport obscene matter interstate for purpose of sale or distribution, and defendants appealed. The Court of Appeals, Ainsworth, Circuit Judge, held that: (1) search by corporation's employees constituted a private search beyond scope of Fourth Amendment; (2) FBI acceptance of films was not a "seizure" within meaning of Fourth Amendment; (3) Government's viewing of films on movie projector did not constitute separate independent search requiring warrant; (4) evidence was sufficient to sustain conviction, and (5) district court properly instructed jury on contemporary community standards.

Affirmed.

Wisdom, Circuit Judge, filed a dissenting opinion.

Appeals from the United States District Court for the Middle District of Florida.

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

AINSWORTH, Circuit Judge:

Arthur Sanders, William Walter, Gulf Coast News Agency, Inc. ("Gulf Coast News") and Trans World America, Inc. ("TWA") appeal their convictions under 18 U.S.C. § 371 for conspiring knowingly to use a common carrier to ship obscene materials interstate, in violation of 18 U.S.C. § 1462, and knowingly to transport obscene matter interstate for the purpose of sale or distribution, in violation of 18 U.S.C. § 1465. Sanders, Walter and Gulf Coast News also challenge their convictions for substantive violations of sections 1462 and 1465.[1] Appellants all allege an unconstitu-

[1]Under 18 U.S.C. § 371,

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1462 provides in pertinent part that

> Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—
>
> (a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent chracter; or . . .
>
> Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful—
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

18 U.S.C. § 1465 provides that

> Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.
>
> The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.
>
> When any person is convicted of a violation of this Act, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items described herein which were found in the possession or under the immediate control of such person at the time of his arrest.

tional search and seizure and attack the district court's jury instructions on obscenity; appellant Walter further contends that he "was not shown to possess the requisite scienter." We find these assertions to be without merit and therefore affirm the convictions.

I. Facts

According to the testimony at trial, on September 15, 1975, Richard Larson, the manager of appellant Gulf Coast News, located in St. Petersburg, Florida, ordered an employee to deliver 12 cartons, containing a series of 8 mm. films entitled "David's Boys,"[2] to Greyhound Bus Package Express in St. Petersburg for shipment to Atlanta. The packages had a nonexistent return address and named a fictitious corporation, "D and L Distributors," as shipper. Described as containing printed matter, they were sent on a "will call" basis to "Leggs, Inc.," another fictitious company. "Legs" was the nickname of a female employee at appellant TWA's Atlanta headquarters. When the cartons reached Atlanta, Greyhound forwarded them to a branch station located near L'Eggs Products, Inc. ("L'Eggs"), a manu-

[2]The series "David's Boys" included 25 individual movie titles. The 12 cartons contained 871 reels of film.

facturer of women's hosiery and regular customer of Greyhound Package Express. After Greyhound informed L'Eggs of the shipment, Michael Horton, a L'Eggs Products employee, came to the terminal, opened one of the cartons and discovered that it contained sexually explicit movies. Horton returned to the L'Eggs office and described the package's contents to a superior, William Fox. Concerned that his company might be implicated in the transportation of pornographic films, Fox drove to the Greyhound station and brought the 12 cartons to the L'Eggs office. He and several other employees opened all the packages and found individual boxes of film. The top of each film box showed the name "David's Boys" and a drawing of two nude males embracing and kissing; on the back of each were the title of the individual movie and a detailed description, in explicit terms, of the bizarre homosexual acts depicted in the film. Fox then telephoned the FBI, explained the nature of the films and asked "them to come out and take the materials away." The FBI procured the films on October 1, 1975, and subsequently viewed them on a projector at its offices. No warrant was obtained.

Appellants Walter and Sanders, who jointly operated appellants TWA and Gulf Coast News, were indicted along with both corporations under 18 U.S.C. § 371 on one count of conspiring knowingly to use a common carrier to ship obscene materials interstate, in violation of 18 U.S.C. § 1462, and knowingly to transport obscene matter interstate for the purpose of sale and distribution, in violation of 18 U.S.C. § 1465. Gulf Coast News, Walter and Sanders were also charged with five counts of substantive violations of section

1462 and five substantive violations of section 1465.[3] The jury convicted TWA of conspiracy and returned guilty verdicts as to Walter, Sanders and Gulf Coast News on all eleven counts. The district court fined TWA $10,000, Gulf Coast News $33,000 and sentenced both Walter and Sanders to three years in prison on each count, to run concurrently.

II. The Constitutionality of the Search and Seizure

Appellants first urge that the district court committed reversible error in failing to suppress the five films admitted in evidence at trial. Since appellants TWA and Gulf made no pretrial motion to suppress, they cannot raise this issue on appeal. *United States v. Bush,* 5 Cir., 1978, 582 F.2d 1016, 1018. Though appellants Sanders and Walter each made a timely motion to suppress and return the films, the district court sought to determine at the outset whether they had standing to challenge the constitutionality of the search and seizure. To establish such standing under traditional Fourth Amendment analysis, a defendant must either show presence on the searched premises at the time of search, allege a proprietary or possessory interest in the premises or objects searched or be charged with an offense that includes as an essential element possession of the seized evidence at the time of the contested search and seizure. *See Brown v. United States,* 411 U.S. 223, 229, 93 S.Ct. 1565, 1569, 36 L.Ed.2d 208 (1973); *United States v. Hunt,* 5 Cir., 1974, 505 F.2d 931, 939-40. "Generally, a defendant satisfies the standing requirement if he has

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[3]The five counts under section 1462 and the five section 1465 counts enumerated the same five movies from the "David's Boys" series: "Look at the Birdie," "The Clean Up," "Black Rape," "The Massage," and "Loving Hands."

an adequate possessory interest in the place or object searched to give rise to a reasonable expectation of privacy." *United States v. Hunt, supra,* 505 F.2d at 938.

In denying appellants' suppression motion, the district judge held that "shipping or causing or suffering to be shipped by a common carrier . . . with a fictitious name given for the shipper as well as the fictitious name given for the consignee or addressee, amounts to a relinquishment or abandonment of any reasonable expectation of privacy. Or, stated another way, it seems to me that it was reasonably foreseeable that what actually occurred would occur. That is to say, that there was substantial likelihood that the material would be misdelivered and fall into the hands of some third party, as actually happened in this case, where it would be opened and its privacy, if it had any, invaded." There is merit in the district court's conclusion. However, the Supreme Court has recently "dispens[ed] with the rubric of standing . . . by frankly recognizing that this aspect of the analysis belongs more properly under the heading of substantive Fourth Amendment doctrine," *Rakas v. Illinois,* ..... U.S. ....., 99 S.Ct. 421, 429, 58 L.Ed.2d 387 (1978) so we will focus "on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing." *Id.,* ..... U.S. at ....., 99 S.Ct. at 428.

A. The Search by L'Eggs Products Employees

Appellants Sanders and Walter argue that the L'Eggs Products employees, in opening the 12 cartons and examining their contents without a warrant, conducted an unconstitutional search. The Fourth Amendment's

warrant requirement, of course, is intended solely "as a restraint upon the activities of sovereign authority," *Burdeau v. McDowell,* 256 U.S. 465, 475, 41 S.Ct. 574, 576, 65 L.Ed. 1048 (1921), and "a search . . . conducted by a private individual for purely private reasons, . . . does not fall within the protective ambit of the Fourth Amendment." *United States v. Lamar,* 5 Cir., 1977, 545 F.2d 488, 489-90; *United States v. Jones,* 5 Cir., 1972, 457 F.2d 697, 699; *Barnes v. United States,* 5 Cir., 1967, 373 F.2d 517, 518. However, if under the circumstances of the case the private party "acted as an 'instrument' or 'agent' of the government," the ostensibly "private" search must meet the amendment's standards. *United States v. Bomengo,* 5 Cir., 1978, 580 F.2d 173, 175. See *Lustig v. United States,* 338 U.S. 74, 79, 69 S.Ct. 1372, 1374, 93 L.Ed. 1819 (1949). Before the L'Eggs Products employees ever contacted the FBI, they had on their own initiative taken the shipment of films from the bus terminal, opened the cartons, examined the individual film boxes and ascertained the nature of the films. Since "there is no indication in the record" that in so doing the L'Eggs employees "acted at the behest or suggestion, with the aid, advice or encouragement, or under the direction or influence of the F.B.I.," we conclude that these activities constituted a private search, beyond the scope of the fourth amendment. *United States v. Clegg,* 5 Cir., 1975, 509 F.2d 605, 609.

B. F.B.I. Acceptance of the Films

Nevertheless, Sanders and Walter contend that the FBI unconstitutionally seized the films, by accepting them from the L'Eggs employees without obtaining a warrant. In making this assertion, they rely principally

on the Eighth Circuit's decision in *United States v. Kelly,* 1976, 529 F.2d 1365. There, an employee of a common carrier discovered that a ripped-open carton of goods contained sexually explicit books and magazines and called the FBI, which sent an agent who examined several of the magazines and retained samples, without obtaining a warrant. Although the *Kelly* court said that the common carrier's search was private, it held that the Government's subsequent acceptance of the fruits constituted a seizure requiring a warrant, "unless there are special circumstances which excuse compliance with the . . . warrant requirement," decided that no exception to that requirement applied and concluded that the warrantless "seizure" was "so unreasonable as to necessitate the operation of the exclusionary rule." *Id.* at 1371.

The result in *Kelly* conflicts with the reasoning implicit in a long line of private search decisions by the Supreme Court and this circuit. In every such case, introducing the fruits of a private search as evidence was impossible unless the private party had at some point surrendered the articles to the Government. Yet neither we nor the Supreme Court have ever held that government acceptance of those articles constitutes a seizure requiring compliance with the warrant requirement, even in cases where no exception to that requirement would have covered the Government's action. *See, e.g., Burdeau v. McDowell,* 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 (1921); *United States v. Lamar,* 5 Cir., 1977, 545 F.2d 488; *United States v. Blanton,* 5 Cir., 1973, 479 F.2d 327; *Barnes v. United States,* 5 Cir., 1967, 373 F.2d 517. Thus, we decline to accept the *Kelly* court's analysis.

In *United States v. Sherwin,* 9 Cir., 1976, 539 F.2d 1, the Ninth Circuit, sitting en banc, also rejected the *Kelly* rationale. *Sherwin* also involved a common carrier employee who examined the contents of damaged packages, discovered sexually explicit books and called the FBI, which sent agents who removed two books from the shipment, without a warrant. Citing *Kelly,* the *Sherwin* defendants argued on appeal that "a seizure to which the fourth amendment is applicable occurred . . . when the F.B.I. agents obtained the two books" from the common carrier, *id.* at 7, but the Ninth Circuit did "not regard the government's acceptance of materials obtained in a private search to be a seizure" and concluded that "the fourth amendment [is] not implicated when articles discovered in a private search [are] voluntarily turned over to the government." *Id.* We agree with the Ninth Circuit's reasoning. Under the circumstances, we hold that the FBI's acceptance of the "David's Boys" films from the L'Eggs employees was not a seizure within the meaning of the fourth amendment.

C. Viewing of the Films

Appellants Sanders and Walter further assert, basing their argument on another Eighth Circuit case, *United States v. Haes,* 1977, 551 F.2d 767, that the Government conducted an additional unconstitutional search by viewing the films on a movie projector without obtaining a warrant. In *Haes,* the employee of a common carrier, seeking to identify the consignee of a shipment, opened a package, discovered sexually explicit films and contacted the FBI, which sent two agents with a movie projector to the common carrier's office, where the films were screened without first obtaining a warrant. Declaring that "the inquiry must be whether

the government" thereby undertook "any new or different searches," the Eighth Circuit said that the Government's viewing of the films "changed the nature of the search," because the private search had involved no such screening, and held that the search was illegal, since no exception to the warrant requirement applied. *Id.* at 773-74.

Unlike *Haes,* however, where the private party "had not viewed the films and had not attempted to make a decision as to whether or not they were obscene," *id.* at 771, the L'Eggs employees were able to make "a determination of possible obscenity prior to turning the films over to the FBI,"[4] *id.* at 772, by examining the individual boxes containing the films. In this case, the legend "David's Boys" and a cartoon of two nude males kissing and embracing appeared on one side of each film box; the other side carried the title of the individual film and a detailed description, in language of the utmost explicitness, of the bizarre homosexual acts depicted in the movie.[5] Under these circum-

[4]In announcing its holding on this issue, the *Haes* majority emphasized the factual circumstances and noted that "[w]e would feel otherwise if the private search had included any sort of viewing of the films and a determination of possible obscenity prior to turning the films over to the F.B.I." 551 F.2d at 771-72. Under the factual circumstances here, however, the L'Eggs employees did not need actually to screen the films to make that determination. The Eighth Circuit stressed that *Haes* "was not the case" where "the private employee had tangible evidence upon which to believe that the material was being illegally transported in interstate commerce," *id.* at 772 n.1, but here, in contrast, the individual film boxes amply supported the belief of the L'Eggs employees that such illegal transportation had occurred.

[5]The indictment listed five of the 25 "David's Boys" titles included in the shipment. The individual boxes containing "Look at the Birdie" said that

> Corbett really gets turned on when Rich comes over for a photo session. In the a—close-ups you won't believe! The highlight of the movie happens when Corbett masturbates and—on Rich's face! This is a flick you will not forget.

"The Clean Up (3 white)" boxes read that

> Lenny and Eric turn each other on and when you see these good looking studs you'll know why!!! The action gets heavy and then Les enters the picture.—galore and Les cleans it up like you've never seen. Great close-ups!

The "Black Rape" (1 blk. 1 wht.) boxes stated that

> Big Black Lance as 11"—but it doesn't take long before the small slender Larry is taking it all right up the . . .! Good tongue action and a surprise that you won't believe. You will love the close-up action.

The boxes containing "The Massage" explained that

> Angelo the masseur gets turned on as he gives Tommy a rubdown. Angelo's expert tongue & hands soon have Tommy's . . . hard & excited. But he wants it the Greek way and Angie complies. Then he . . . beautiful on Tommy's face! This is one of the best close-ups of french love you will ever see!!

Finally, the "Loving Hands" boxes said that

> Murray and Carl are well into their love session when Ben enters the room. He will show you his loving hands as he shoves them with his arms . . . (just short of his elbows!) right up his friends' a.... h.....!! While they masturbate! It is a true masterpiece for the avid connoisseur!!

(Certain particularly salacious words have been deleted by the writer of this opinion as indicated.)

stances, since the L'Eggs employees so fully ascertained the nature of the films before contacting the authorities, we find that the FBI's subsequent viewing of the movies on a projector did not "change the nature of the search" and was not an additional search subject to the warrant requirement.[6] We have held that the re-

[6]We note as well the question posed by then Judge Webster in his *Haes* dissent:

> Can it be seriously argued that an agent receiving a suspected book or magazine from a freight carrier employee could not reasonably open the publication and peruse its pages to determine whether its contents offended the law? Would a government agent who used a magnifying glass or other mechanical aid to identify an object be vulnerable to a claim of an unreasonable search inde-

(This footnote is continued on next page)

opening and reinspection of a bag by government authorities following a private search does not constitute a separate, independent search requiring a warrant. *United States v. McDaniel,* 5 Cir., 1978, 574 F.2d 1224, 1226-27; *United States v. Blanton,* 5 Cir., 1973, 479 F.2d 327, 328. These decisions support our conclusion on this issue, for in our view, "much less than reopening and reinspection of the box and its contents was the activity of the FBI" here.[7] *United States v. Pryba,* 1974, 163 U.S. App.D.C. 389, 399, 502 F.2d 391, 401.[8] *See also United States v. Ford,* 10 Cir., 1975, 525 F.2d 1308, 1312.[9] [See next page for fn. 9.]

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pendent of the lawful private search which produced the object? I think clearly not.

The film in this case was not a means of concealing something else. In looking at the film through a projector, the agents did no more than view the motion pictures in the manner in which they were intended to be viewed. 551 F.2d at 772-73.

[7]The Supreme Court's decision in *United States v. Chadwick,* 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) does not affect the outcome of this case. In *Chadwick,* the federal agents gained exclusive custody of property still to be searched, whereas here, the FBI took control of property that had already been searched by a private party and did not conduct any additional search of its own requiring a warrant. (*See also United States v. Johnson,* 5 Cir., 1979, 588 F.2d 147.

[8]In *Pryba,* a nervous shipper, reluctant to disclose the contents of a box, aroused the suspicions of an air freight clerk in San Francisco. The clerk's supervisor opened the box and found "unpackaged reels of 8-millimeter color movie film bearing titles unsubtly suggesting sex." The supervisor held two films up to the light and saw both hetero- and homosexual nude couples "engaging in sexual acts." He called the FBI, which sent an agent with a movie projector to the freight carrier's office. After watching two more movies, with the FBI agent still present the supervisor repackaged the films and replaced the boxes in transit to Washington. 163 U.S.App.D.C. at 393, 502 F.2d at 395. Judge Spottswood Robinson first concluded that the activities of the clerk and his employer before the FBI brought the movie projector constituted a private search and then declared that "we are unable to perceive in the subsequent events any new or different

III. Walter's Scienter

Appellant Walter contends that there was insufficient evidence to sustain his conviction, because the Government failed to establish a "close nexus" between him and "a specific shipment of proved obscene matter" and because there was no evidence as to scienter. This assertion is meritless, as there was ample evidence to support the jury's finding that Walter knowingly used a common carrier to ship obscene materials interstate, knowingly transported obscene matter interstate for the purpose of sale or distribution and knew the obscene nature of the films shipped interstate.

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search after the F.B.I. agent arrived. There is respectable authority holding that not even a reopening and reinspection of a package by federal officers, after the initial opening and inspection by airline personnel entirely on their own, constitutes a separate or additional search subject to Fourth Amendment requirements. We need not venture nearly so far, for much less than reopening and reinspection of the box and its contents was the activity of the FBI in the instant case." *Id.* 163 U.S.App.D.C. at 399, at 401.

[9]In *Ford,* as in *Pryba,* a nervous shipper, at first unwilling to identify the contents of a package, led an air freight supervisor to unwrap the box. He discovered "about eight prophylactics, six or seven inches long, containing a powdered substance," and called the local police. When the officers arrived, they conducted an "on-the-spot field test" which "showed that the substance was heroin." 525 F.2d 1308. Rejecting the assertion that the agents thereby conducted an illegal, warrantless search, the Tenth Circuit said that the "government agents appeared only after the suspicion of the possible presence of contraband was confirmed by discovery of the prophylactics. At this point, it was the province and indeed the duty of the officers to further investigate the open box, which they did without any invasion of protected rights of privacy, to determine whether the suspicious substance in plain view was in fact contraband . . . . In these circumstances, we are unable to perceive any new or different search after the government agents arrived." *Id.* at 1312. Similarly, the FBI agents here, in viewing the films on a projector, were attempting to confirm or dispel the suspicion, first developed by the L'Eggs employees, that the films had been transported illegally.

According to the testimony at trial, Walter and Sanders jointly operated an extensive network of adult cinemas, bookstores and distribution warehouses, which included appellants TWA and Gulf Coast News. Ernest Golden, who had served as accountant and bookkeeper for these various enterprises, testified that he received instructions from both Walter and Sanders when keeping accounts and preparing tax returns for a number of corporations, including TWA and Gulf Coast News. William Boshell, who succeeded Golden as accountant, testified that Walter and Sanders both supplied him with the business records of the various corporations. He said that Walter, Sanders and all the corporations had their offices at TWA and added that he was paid with a TWA check for services rendered to the other businesses.

John Catoe, an employee of Walter and Sanders, related at trial that both men told him in 1973 that they were planning a new corporation to distribute sexually explicit materials and that Sanders later stated that this corporation was TWA. According to Catoe, he and all other TWA employees received work instructions from both Walter and Sanders. Catoe also said that when the two men sent him to Florida to manage a new bookstore in June 1975, they explained that Gulf Coast News had been established to supply their Florida operations. In addition, Catoe stated that Walter gave him expense money and ordered him to follow the directions of Richard Larson, the manager of Gulf Coast News, whom Catoe had met at TWA when Larson was being trained. Ronald Bowman, the Gulf Coast News employee who delivered the "David's Boys" films to Greyhound's St. Petersburg terminal, testified that on one visit to the Gulf Coast News warehouse

Sanders was introduced as the man "[y]ou will be working for" and that on another occasion Walter was introduced as Sanders' partner. Bowman also recalled that Richard Larson described the two as partners and identified as theirs the desks in the back of the warehouse. Finally, Carol Maxey, Sanders' former girl friend, testified that Sanders told her that he and Walter jointly owned a number of businesses, including Gulf Coast News.

Given the foregoing testimony describing Walter's central role in the management of TWA, Gulf Coast News and other companies involved in the distribution and sale of hardcore pornography, we do not believe that "the jury must necessarily have had a reasonable doubt" that he possessed the requisite scienter, *United States v. Warner,* 5 Cir., 1971, 441 F.2d 821, 825, *cert. denied,* 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 58 (1971). Accordingly, we conclude that there was sufficient evidence to support Walter's conviction.

III. The District Court's Instructions on Contemporary Community Standards

Finally, appellants challenge the district court's jury instructions regarding the community standards element of the definition of obscenity. They contend that *Pinkus v. United States,* 436 U.S. 293, 98 S.Ct. 1808, 56 L.Ed.2d 293 (1978) and our subsequent decision in *United States v. Bush, supra,* required the trial judge expressly to charge the jury not to consider children in determining the contemporary standards of "the average person of the community as a whole." We reject appellants' expansive reading of *Pinkus* and *Bush* and find no error in the district court's instructions.

In *Pinkus,* the trial judge had charged the jury that, in ascertaining community standards, " 'you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious, men, women and children, from all walks of life'." *Pinkus v. United States, supra,* 436 U.S. at 296, 98 S.Ct. at 1811 (emphasis added). The Supreme Court elected "to take this occasion to make clear that children are not to be included for these purposes as part of the 'community' as that term relates" to the definition of obscenity and therefore held that "it was error to instruct the jury that . . . [children] were a part of the relevant community." *Id.* at 1812. Similarly, in *Bush* the district court had told the jury that "you are to consider the community as a whole, *young and old,* educated and uneducated, religious and the irreligious." (emphasis added). In holding that this charge constituted reversible error, we reasoned that inclusion of "[t]he phrase 'young and old' . . . provides a jury ample freedom to consider children, and thus does not completely avoid the danger, emphasized in *Pinkus,* that 'the adult population [will be reduced] to reading only what is fit for children." (citation omitted) 582 F.2d at 1021-22.

Here, however, unlike the instructions in *Pinkus* and *Bush,* the trial judge's charge did not prescribe jury consideration of "children" or "young people" in determining community standards. The district court told the jurors to judge the obscenity of the films by whether their "predominant appeal . . . viewed in [their] entirety, is to the prurient interest of *the average person of the community as a whole,* or the prurient interest of a deviant sexual group, as the case might be, and is so patently offensive that it is utterly without redeeming social value." (emphasis added). The judge further explained that "[w]hether the predominant theme or purpose of the material is an appeal to the prurient interest of the 'average person of the community as a whole' is a judgment which must be made in light of contemporary standards as would be applied by the average person with an *average and normal attitude toward, and an average interest in, sex.*" (emphasis added) This instruction adequately directed jury consideration to the contemporary standards of adults and thereby avoided the danger emphasized in *Pinkus* and *Bush.*

We have carefully examined appellants' remaining assertions[10] and conclude that they are meritless. Accordingly, we affirm the judgments of conviction as to all appellants.

AFFIRMED.

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[10]Appellants also contend, individually or in unison, that by accepting and holding the whole shipment of films the Government engaged in prior restraint in violation of the first amendment, that the trial judge should have granted a change in venue, that he erred in refusing to admit comparison evidence and that the district court should have compelled the prosecution to present expert witnesses. In addition, they assert numerous errors in the trial judge's other rulings on pretrial and trial motions and in his instructions to the jury and argue that the voir dire conducted by the court was insufficient. Finally, Walter urges that the prosecution was guilty of prejudicial misconduct, that juror misconduct also prejudiced appellants, that the district court erred in denying his motion for severance and that the films were not obscene.

WISDOM, Circuit Judge, dissenting:

I respectfully dissent. Today the Court holds that the government may take possession of 12 cartons containing 871 films, view the films two months later, retain them for yet another two months—without obtaining a warrant at any point—if the films are the fruit of a private search. The majority reaches the conclusion that the FBI's acquisition of the films in this case falls short of a "seizure" without considering the first amendment interest at stake when expressive matter is taken out of circulation by the government. "The Fourth Amendment * * * must not be read in a vacuum". *Roaden v. Kentucky,* 1973, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757. In my view, the approach of the Eighth Circuit Court of Appeals in *United States v. Kelly,* 1976, 529 F.2d 1365, represents the proper accommodation of the first and fourth amendments. I would reverse the defendants' convictions on the ground that the films were seized in violation of the fourth amendment and, therefore, were illegally admitted into evidence.

I.

The majority presents the facts accurately but not completely. A longer look at the events that occurred once the employees of L'Eggs Products, Inc. notified the FBI of the receipt of the shipment of films leads me to the conclusion that the defendants retained a constitutionally protectible interest in the films that was impermissibly intruded upon by the government.

On September 26, 1977, Michael Horton, area manager for L'Eggs, pried upon one of twelve packages, which were so unusually securely wrapped and reinforced that they did not look "normal" to him. He

discovered that the carton contained films boxes with various sexual scenarios described on the covers. Horton passed on this information to his branch manager, William Fox. Fox then went to the Greyhound terminus, informed the Greyhound employee in charge that the boxes did not belong to L'Eggs, but took them with him anyway, without, however, paying the collect charges. Later, Fox informed FBI agent Mandyk of the incident. Mandyk told Fox to put the cartons aside until he arrived. He also asked the L'Eggs employees to obtain the name of anyone who called to inquire about the packages.

Meanwhile, the defendants made several attempts to find their shipment. One of the defendants called Greyhound to report that the packages were missing. He put a tracer on the shipment, leaving his name and telephone number with Greyhound. During the next few days several of the defendants visited the Greyhound station. Although the assistant terminal manager knew that the packages had been taken to the L'Eggs office, on the instructions of the FBI, he did not provide the defendants with this information. Instead, he told the FBI about the inquirers. The defendants also called the L'Eggs office. They, too, denied that they had the shipment.

Five days after Fox called the FBI, two agents arrived at the L'Eggs office and took possession of the packages and their entire contents. Two months later Agent Mandyk screened each of the 871 films on an office projector. There were twenty-five title films; the remaining 846 films were copies. Another two months elapsed before the FBI turned the films over to the United States Attorney's office. Over a year

later the indictments were returned. Of the twenty-five title films, the government charged that five were obscene.

II.

The major teaching of the Supreme Court's decisions in the obscenity area is that some form of judicial procedure " 'designed to focus searchingly on the question of obscenity' " must precede governmental interference with material arguably within the protection of the first amendment. *See Heller v. New York,* 1973, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745; *A Quantity of Books v. Kansas,* 1964, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809. Because the FBI did not apply to a magistrate for a warrant at any point, the only judicial determination of obscenity was made at the trial on October 21, 1977—over two years after the 871 films were taken out of circulation by the government. Yet, the majority relegates to a footnote the defendants' contention that there was an illegal prior restraint. *See* note 10 of the majority opinion.

I must assume from the majority's dismissal, without discussion, of the issue of prior restraint that it agrees with the government that there is no first amendment interest at stake in this case. Before this Court, the government argued that the films were not entitled to the protection of the first amendment because they were furtively distributed. When taken, the films were neither being sold nor exhibited to the general public; hence, the government reasons, the public's first amendment right of access to nonobscene matter was not infringed. To support its contention that films enjoy no special constitutional status unless they are available to the general public, the government relies on language in a decision of the Second Circuit Court of Appeals.

"This was strictly an underground operation in hard core pornography with clandestine storage facilities not intended to be available to the public . . . . The 'setting' then is hardly such as to presumptively invoke first amendment protection." *United States v. Cangiano,* 2 Cir. 1974, 491 F.2d 906, 913, cert. denied, 419 U.S. 904, 95 S.Ct. 188, 42 L.Ed.2d 149.

It is, of course, true that the procedural safeguards required by the first amendment vary with "the nature of the materials seized and the setting in which they are taken". *Roaden v. Kentucky,* 1973, 413 U.S. 496, 503, 93 S.Ct. 2796, 2801, 37 L.Ed.2d 757. A prior adversary hearing must be held before a large quantity of expressive material is seized by the government for the purpose of destruction. *See A Quantity of Books v. Kansas,* 1964, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809; *Marcus v. Search Warrant of Property,* 1961, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127; *Lee Art Theatre v. Virginia,* 1968, 392 U.S. 636, 88 S.Ct. 2103, 2104, 20 L.Ed.2d 1313 (per curiam). "[S]eizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the *bona fide* purpose of preserving it as evidence in a criminal proceeding." *Heller v. New York,* 1973, 413 U.S. 483, 492, 93 S.Ct. 2789, 2794, 37 L.Ed.2d 745. Such a seizure is permissible if a neutral magistrate issuing the warrant determines that there is probable cause to believe that the film is obscene and an adversary hearing is available promptly after the seizure.

When films are not subject to absolute suppression, in the sense of destruction, and the public interest in free circulation of the films is attenuated, less strin-

gent procedural limitations on governmental action may be justified. This does not mean, however, that films furtively distributed to a small cadre of customers lose all constitutional protection and may be treated by the government as if they were contraband or ordinary instruments of a crime. The protection of the first amendment cannot turn solely on the size of the audience that expressive matter will reach. History teaches that the first amendment is concerned not only with the public's right of access but also with the right of unpopular and small minorities to express their views. Nor should first amendment protection hinge on the method of dissemination, for unpopular minority views are most likely to be disseminated in a furtive and clandestine fashion. *See United States v. Alexander,* 8 Cir. 1970, 428 F.2d 1169, 1175; Note, *The Right to an Adversary Hearing on the Issue of Obscenity Prior to the Seizure of Furtively Distributed Films,* 69 Mich.L.Rev. 913, 926-40 (1971).

Indeed, the question before the Second Circuit Court of Appeals in *Cangiano* was not whether the films were presumptively under the protection of the first amendment. The FBI obtained a warrant before seizing the material and an adversary hearing was available upon request by the defendant. The Court merely held that the "setting" was not such as to invoke the requirements of a prior adversary hearing before seizure. I do not know any cases, certainly not in this Circuit, holding that the taking of furtively distributed films raises no first amendment concerns at all. Such a proposition would be startling in light of the Supreme Court's decision in *Heller v. New York,* 1973, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745. There, a single copy of a film was seized. Because other copies were available

for screening to the public, there was no restriction on the public's right of access. Yet, the Court held that the copy could be seized as evidence only if the government observed strict procedural safeguards.[1] "The necessity for a prior judicial determination of probable cause will protect against gross abuses, while the availability of a prompt judicial determination in an adversary proceeding following the seizure assures that difficult marginal cases will be considered in light of First Amendment guarantees". 413 U.S. at 493, 93 S.Ct. at 2795.

I have elaborated on decisions in the area of obscenity and prior restraints to demonstrate that the defendants had a legitimate first amendment interest in the films at the time they were taken by the FBI. I do not decide whether the restraint imposed in this case was so extensive that an adversary hearing should have been held before the films were taken. It is unnecessary to decide that question because the government did not observe the minimum procedural safeguards demanded by the Supreme Court in *Heller.* I point out, however, that unlike *Heller* the amount of material taken by the FBI in this case must be termed "massive". The retention of 846 copies far exceeds the requirements of officers seeking to pursue criminal charges. Moreover, we do not know whether the films were

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[1]The first articulation of the view that furtively distributed films are entitled to no first amendment protection was in a district court opinion, *United States v. Pryba,* D.D.C. 1970, 312 F.Supp. 466. There, too, a warrant was obtained before seizure of the films. The decision of the district court was upheld by the District of Columbia Court of Appeals on the alternative theory that the requirements of *Heller* were satisfied. *United States v. Pryba,* 1974, 163 U.S.App.D.C. 389, 412-13, 502 F.2d 391, 404-05.

earmarked for storage in a warehouse or whether they were on the threshold of dissemination. One cannot assume, therefore, that the FBI's actions did not block the orderly distribution of the films. And in that circumstance, the Supreme Court has implied that the requirements of *A Quantity of Books* must be met. *Heller v. New York*, 1973, 413 U.S. at 492, 93 S.Ct. 2789.

III.

Given the special constitutional character of the items taken by the FBI, I see two mutually supporting reasons that compel application of the exclusionary remedy in this case.

In the first place, the first amendment is an independent source of restrictions upon the power of the police to take expressive material. For example, because of first amendment concerns, a film cannot be seized as an incident to a lawful arrest. *Roaden v. Kentucky*, 1973, 413 U.S. 497, 93 S.Ct. 2796. This is true even though the fourth amendment is generally understood to permit the seizure of items during a lawful arrest. *Chimel v. California*, 1969, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685. As the Court explained in *Roaden*, the seizure of a copy of a film "by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint" . . . 413 U.S. at 504, 93 S.Ct. at 2801. "The seizure proceeded solely on the police officer's conclusions that the film was obscene; there was no warrant. Nothing prior to seizure afforded a magistrate an opportunity to 'focus searchingly on the question of obscenity.'" 413 U.S. at 506, 93 S.Ct. at 2802. Thus, to supply the necessary judicial determination of obscenity, the

Supreme Court harnessed the fourth amendment procedural guarantee of a neutral magistrate.[2]

Functionally, the government's acceptance of the films in this case resembles a "seizure" resulting in a prior restraint. It is a nonjudicially imposed suppression of expressive matter. Like a seizure "proceed[ing] solely on the police officer's conclusion", the acceptance and retention of the films wholly frustrated the exercise of first amendment rights without any searching inquiry by a magistrate into the merits of the first amendment claim. It is imperative, therefore, to view the acquisition of these films by the FBI as a "seizure" subject to the procedural guarantees of the fourth amendment.[3]

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[2]The Supreme Court has also held that the first amendment imposes its own, more stringent, limitations on obtaining and executing a search warrant. A judicial warrant for the seizure of a film may not be issued "solely upon the conclusory assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officer's conclusions." *Lee Art Theatre, Inc. v. Virginia*, 1968, 392 U.S. 636, 637, 88 S.Ct. 2103, 2104, 20 L.Ed.2d 1313 (per curiam); *Marcus v. Search Warrant of Property*, 1961, 367 U.S. 717, 731-32, 81 S.Ct. 1708, 6 L.Ed.2d 1127. Furthermore, where books are seized, a heightened degree of specificity in a search warrant's description of "things to be seized" is required. *Stanford v. Texas*, 1965, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431. "But where the special problems associated with the First Amendment are not involved . . . is a more 'reasonable particularity' . . . is permissible". *Berger v. New York*, 1967, 388 U.S. 41, 98, 87 S.Ct. 1873, 1904, 18 L.Ed.2d 1040. (Harlan, J., dissenting).

[3]Professor Monahan suggests a similar analysis with respect to warrantless arrests. Viewing the first amendment as a source of restrictions upon the power of the police to seize persons as well as things, he argues that the police should be prohibited from arresting those committing offenses in their presence when the offenders are exhibitors or distributors of arguably first amendment protected matter. "Functionally, an arrest resembles a nonjudicially imposed injunction against certain conduct; . . . here, there is not even the barest judicial inquiry before the damage is done." Monahan, First Amendment "Due Process", 83 Harv.L.Rev. 518, 538 (1970).

The suppression of the films as evidence is also justified under traditional fourth amendment doctrine.

I start from the premise that the defendants had a constitutionally protectible privacy interest in the packages before they were discovered by the employees of L'Eggs. The district court held that shipping material by means of a common carrier to a fictitious consignee amounted to a relinquishment or abandonment of any reasonable expectation of privacy. The majority agrees with this conclusion. *See* slip opinion page 3892, page ..... of the majority opinion. The increased likelihood that the parcel would be misdelivered cannot be equated with an abandonment of all reasonable expectations of privacy. Misdelivered packages are usually returned; indeed, they are usually returned unopened. The careful manner in which the films were wrapped in individually sealed containers as well as the use of a fictitious cover name for the addressee demonstrates, instead, a strong desire to maintain the defendants' interest in privacy, to avoid the contents getting into the wrong hands, and to continue ownership of the films or a possessory interest in the films until their delivery into the right hands.

The initial search of these films was by private parties and was, therefore, outside the scope of the fourth amendment. *Burdeau v. McDowell,* 1921, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048. A search, however, is merely the first step in an invasion of privacy that ends with the introduction in court of incriminating evidence. When the initial search is conducted by private parties, the question remains whether governmental conduct after that point amounts to an independent invasion of the right of privacy controlled by the standards of the fourth amendment. *See generally*

Note, *Private Searches and Seizures,* 90 Harv.L.Rev. 463 (1976).

The majority also does not hold that fourth amendment issues were automatically exhausted once the initial private search was completed. The Court scrutinizes separately whether the government's viewing of the films discovered in the private search was an additional "different" search, concluding that when the FBI agent screened films, the obscene content of which had already been ascertained by the employees of L'Eggs, he "did not 'change the nature of the search[4]' ". The majority refuses, however, to test the government's acquisition of the films against the same standard. Without examining the nature of the FBI's actions in taking and retaining the fruits of the private search, the Court holds that it was not a "seizure"; it was no more than a passive acceptance of an accomplished fact.

The government's acquisition of the fruits of the private search must be termed a "seizure" because it interfered with the defendants' interest in the films in a new and different way. "It constituted a deprivation of the defendants' property interests". *See* Note, *Private Searches and Seizures, supra* at 469. The defendants had a legitimate possessory interest in the films acquired by the FBI until a judge, jury, or neutral magistrate issuing a warrant, established probable obscenity. They had, therefore, a reasonable expectation of freedom from governmental interference with these films. "Legitimation of expectations of privacy by law must have

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[4]Although I believe that the FBI's examination of the films at the L'Eggs' office was not an independent "search" subject to the fourth amendment, I cannot agree with the majority's conclusion that the later screening of the films at the office of the FBI was merely a continuation of the private search. *See* text slip opinion pp. 3906-3907, pp. .....-..... *infra.*

a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others, see W. Blackstone, Commentaries, book II, Ch. I, and one who owns or lawfully possesses . . . property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." *Rakas v. Illinois,* 1978, ... U.S. ....., 99 S.Ct. 421, 58 L.Ed.2d 387, 401, n. 12. This expectation is protected by the fourth amendment.

It is true that when the employees of L'Eggs took the packages from the common carrier and opened them, the defendants' ordinary privacy interest in the packages, in the sense of their desire to insulate the contents of the packages from the eyes of others, was infringed. That interest was not affected in any new way by the FBI's observance of the contents of the packages at the L'Eggs office.[5] But the defendants' retained a possessory interest in the films themselves, because they had a reasonable expectation that the packages would be retrieved after misdelivery or returned by the private parties to the common carrier. They also had a reasonable expectation that the films would be returned to them by the government pending a judicial determination of obscenity. Thus, they had a right to exclude the government from taking posses-

[5]*See* note 4 *supra.*

sion of the films. When the FBI appropriated the films, it abruptly and completely interfered with these legitimate expectations. The appropriation of the films was, therefore, a "seizure".

The majority contends, nevertheless, that the Eighth Circuit's characterization, in *Kelly,* of the government's acceptance of the films as a "seizure" contradicts a long line of decisions by the Supreme Court and this Circuit. None of the cases cited by the majority, except *Sherwin v. United States,* 9 Cor. 1976, 539 F.2d 1, addresses the taking of material presumptively protected by the first amendment. And it is worth noting that, in *Sherwin,* the FBI immediately obtained a warrant to seize a shipment of books after it accepted two copies of printed material discovered in the private search. Furthermore, none of the cases cited by the majority undertakes a separate fourth amendment analysis of the government's acquisition of the items discovered in the private search.

Over fifty years ago the Supreme Court held in *Burdeau v. McDowell, supra,* over a dissent by Justices Brandeis and Holmes, that papers stolen by a thief and turned over to the government could be used as evidence at trial. The Court did not explicitly consider whether the government's acceptance of the papers was a seizure. Commentators have cast doubt on the continued vitality of the *Burdeau* rule in its broadest sense. It permits the government to accomplish circuitously what it could not accomplish directly. In other words, it is the twin of the "silver platter" doctrine

that allowed federal prosecutors to use illegal evidence independently obtained by state and local officers. *See generally,* Baade, *Illegally Obtained Evidence in Criminal and Civil Cases: A Comparative Study of a Classic Mismatch,* II, 52 Tex.L.Rev. 621, 661 (1974). Note, *The Fourth Amendment Right of Privacy: Mapping the Future,* 53 Va.L.Rev. 1314, 1336-59 (1969). The "silver platter" doctrine was abandoned nearly thirty years after *Burdeau* was decided. *Elkins v. United States,* 1960, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669. Moreover, when *Burdeau* was decided, there were few justifications for warrantless seizures. "The failure of *Burdeau* to subject the government's acceptance of privately discovered objects to fourth amendment analysis gave the police a desirable freedom of action. Under current fourth amendment doctrine, the exceptions to the warrant requirement . . . permit the police to take immediate action where their protective and law enforcement duties most demand it." Note, *Private Searches and Seizures, supra,* at 469.

The Fifth Circuit cases cited by the majority are primarily concerned with whether there was a "separate or additional *search*" by the government. *See United States v. Blanton,* 5 Cir. 1973, 479 F.2d 327, 328 (emphasis added); *United States v. Lamar,* 5 Cir. 1977, 545 F.2d 488. The majority argues, however, that the introduction into evidence of the fruits of the private search would have been impossible in each of these cases unless the government's acceptance of the articles turned over by the private parties was implicitly immunized from the fourth amendment. Yet in each of the cases the actual seizure of the items can be justified under traditional exceptions for warrantless seizures. For example, in *Lamar,* an airport official

discovered heroin in a bag left by a passenger at the airport. He showed the contents of the bag to the police. When the passenger reclaimed the bag later that night, he was arrested. The bag could have been taken into possession by the police as an incident to a lawful arrest.[6]

In this case, the warrantless seizure cannot be justified under existing exceptions to the warrant clause. The employees of L'Eggs had no authority to consent to the government's appropriation of the presumptively lawful contents of the package. The seizure cannot be justified under the plain view doctrine. *See United States v. Kelly,* 8 Cir. 1976, 529 F.2d at 1372-73. There were no exigent circumstances necessitating immediate action. The FBI had ample opportunity to secure a warrant on the basis of an affidavit by either the FBI agents or the employees of L'Eggs. The seizure was, therefore, unreasonable.

IV.

When evidence is seized in violation of the fourth amendment, the constitutional remedy is the suppression of the illegally obtained evidence. The exclusion of the films as evidence, rather than the return of the films to the owners, is the proper remedy in this

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[6]The FBI's acceptance of a bag containing a silencer, discovered in a private search at the airport, in *United States v. Blanton,* 5 Cir. 1973, 479 F.2d 327, was also "reasonable" because it was incident to a lawful arrest and because exigent circumstances justified the warrantless seizure. 479 F.2d at 328. Thus, other circuits have scrutinized the reasonableness of governmental takings of objects in a private search directly under the fourth amendment. *See, e.g., United States v. Ogden,* 9 Cir. 1973, 485 F.2d 536, 540; *United States v. Tripp,* 9 Cir. 1972, 468 F.2d 569, 570, *cert. denied,* 1973, 410 U.S. 910, 93 S.Ct. 965, 35 L.Ed.2d 272.

case. This is true even though the source for characterizing government action as a seizure is primarily the first amendment[7] and even though the principal interest infringed in this case is a possessory one.[8] When

[7]Many courts, including a panel of this Circuit, have held that "'[w]hen materials are seized in violation of the first amendment, the appropriate remedy is return of the seized property, but not its suppression as evidence at trial'". *United States v. Bush*, 5 Cir. 1978, 582 F.2d 1016, 1021. *See also United States v. Sherwin*, 9 Cir. 1976, 539 F.2d 1, 8 n. 11; *United States v. Cangiano*, 2 Cir. 1972, 464 F.2d 320, 328, *vacated on other grounds*, 1973, 413 U.S. 913, 93 S.Ct. 3047, 37 L.Ed.2d 1023, *on remand*, 2 Cir., 491 F.2d 905, *cert. denied*, 1974, 418 U.S. 934, 94 S.Ct. 3223, 41 L.Ed.2d 1171; *Tyrone, Inc. v. Wilkinson*, 4 Cir. 1969, 410 F.2d 639, 641; *Metzger v. Pearcy*, 7 Cir. 1968, 393 F.2d 202, 204. These cases are concerned with the seizure of expressive matter pursuant to a warrant but without a prior adversary hearing. The courts have reasoned that the exclusionary rule does not apply where a seizure is defective for lack of an adversary hearing because "the primary right involved is the public's First Amendment right of access, rather than the defendant's Fourth Amendment immunity from unreasonable search and seizure". *Huffman v. United States*, 1972, 152 U.S.App.D.C. 238, 244, 470 F.2d 386, 392.

At least one court has recognized, however, that the Supreme Court's decisions in *Heller* and *Roaden* may obliterate any distinction between violations of the first and fourth amendments when a seizure of expressive matter is defective for lack of a determination of probable obscenity by a neutral magistrate. *See United States v. Pryba*, 1974, 163 U.S.App.D.C. 389, 402, 502 F.2d 391, 404 n. 97.

[8]In *Sherwin*, the Ninth Circuit Court of Appeals suggested that "when objects found in a private search are turned over to the government, then, only the property interests of the owner are implicated. A motion for return of the objects is a proper means of asserting these interests". 539 F.2d at 8, n. 10. Because "the principal object of the Fourth Amendment is the protection of privacy rather than property . . ." *Warden v. Hayden*, 1967, 387 U.S. 294, 304, 87 S.Ct. 1642, 1648, 18 L.Ed.2d 782, . . . "[e]ven when there is a governmental seizure, suppression as evidence may not be the proper remedy if only property rights are affected and there has been no governmental invasion of privacy." 539 F.2d at 8, n. 10.

The *Sherwin* court's preference for the remedy of return of the objects rather than their exclusion from evidence at

the government obtains films discovered in a private search and retains them, without the knowledge of the owner, for a considerable period of time, the remedy of return comes too late. The owners did not know where the films were. Indeed, the government took pains to ensure that the defendants would not be able to locate the films. The defendants could not ask the government to return the films until they were informed that the government had taken possession of their packages. This information was conveyed, at the earliest, more than a year after the films were acquired by the FBI.[9] Moreover, the Supreme Court has implicitly recognized, in *Roaden*, that the exclusionary rule is the most effective deterrent to unlawful government action affecting freedom of expression. Observing that the "'use by government of the power of search and seizure as an adjunct to a system for the suppression of objectionable publications is not new. . . .'" 413 U.S. at 506, 93 S.Ct. at 2802, *citing Marcus v. Search Warrant of Property*, 1961, 367 U.S. 717, 729, 81 S.Ct. 1708, 6 L.Ed.2d 1127, the Court reversed a convction based on the admission

trial is based on a mistaken view that possessory interests have no role in delineating reasonable expectations of privacy. On the contrary, recent Supreme Court decisions have emphasized that there is no abstract concept of privacy and that the concept of legitimate property interests can define more concretely the scope of the fourth amendment. *See, e.g. Rakas v. Illinois*, 1978, ... U.S. ....., 99 S.Ct. 421, 58 L.Ed.2d 387, *quoted* in text, slip opinion p. 3903, p. ....., *supra*.

[9]Return of the objects may have been an appropriate remedy in the circumstances of *Sherwin*. In that case, the owners were immediately informed that the government had taken possession of two copies of obscene material. Moreover, when the FBI applied for a warrant the following day, to seize the remainder of the shipment, the magistrate ordered that notice be given to the defendants.

into evidence of films seized incident to a lawful arrest. Therefore, I would reverse the convictions of the defendants in this case.

V.

I would also reverse the convictions of the defendants on the ground that the FBI conducted an independent search, prohibited by the fourth amendment, after acquiring the films.

Relying on language in *United States v. Haes,* 8 Cir. 1977, 551 F.2d 767, the majority holds that the screening of the films on a projector at the office of the FBI was not a separate, independent search because the L'Eggs employees, unlike the private searches in *Haes,* had already ascertained the nature of the films from the box covers and were able to make "a determination of possible obscenity prior to turning the films over to the FBI." 551 F.2d at 772. The "sense impressions or legal conclusions" of the employees of L'Eggs have no place in determining whether the FBI agents conducted a new or different search. *See United States v. Haes,* 551 F.2d at 773 (Webster, J., dissenting). The question whether the films were obscene bears only on the issue of probable cause to search and seize the films; and that determination must be made by a neutral magistrate issuing a warrant.

Nor can I agree with the majority that the FBI's viewing of the films on a screen was merely a continuation of the private parties' observation of the box covers because, as it turned out, the covers accurately reflected their contents. The two-month hiatus between the private search and the governmental screening negates any assumption that one continuous search took

place. *Cf. Coolidge v. New Hampshire,* 1971, 403 U.S. 443, 458, 464, 91 S.Ct. 2022, 29 L.Ed.2d 564. Each of the cases cited by the majority deal, instead, with governmental viewing of material immediately after being called to the scene of the private search by the private parties. *See United States v. McDaniel,* 5 Cir. 1978, 574 F.2d 1224; *United States v. Blanton,* 5 Cir. 1973, 479 F.2d 327; *United States v. Pryba,* 1974, 163 U.S.App.D.C. 389, 399, 502 F.2d 391, 401; *United States v. Ford,* 10 Cir. 1975, 525 F.2d 1308, 1312. Second, as in *Haes,* the FBI's actions in viewing the films two months later must be characterized as "initiating and carrying out their own inspection of the films for their own purposes." 551 F.2d at 771. If the descriptions on the box covers are an infallible guide to the contents of the films there would have been no need to retain the films for two months before making them available to the United States Attorney's office.

Contrary to the majority, I see no basis for distinguishing the Supreme Court's decision in *United States v. Chadwick,* 1977, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538, from the instant case. See note 7 of the majority opinion. In *Chadwick,* the Supreme Court held that the FBI could not search the contents of a footlocker after it took exclusive custody of the item without obtaining a warrant. Before the FBI took exclusive possession of the items in this case, the L'Eggs employees had viewed the film boxes but had not opened the boxes or viewed their contents. True, there was probable cause to believe that the boxes contained obscene films. But in *Chadwick,* too, there was probable cause to believe that the footlocker contained contraband—and the search validated this assumption. In

this case, therefore, as in *Chadwick*, a judicial warrant must be obtained before the containers can be searched.

VI.

The *Burdeau* rule has spawned much critical literature.[10] Today, the Court extends that rule into an area where the constitutional requirements of the fourth amendment are to be "accorded the most scrupulous exactitude". *Stanford v. Texas*, 1965, 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431. Placing the government's acceptance of expressive materials outside the scope of the fourth amendment, by "cast[ing] the government in the role of a passive receiver . . . absolve[s] the government of any first amendment responsibilities or restrictions . . . [It] allows for the possibility of government-sanctioned private censorship without judicial supervision." Note, *Private Searches and Seizures, supra* at 467. In short, the majority rule frustrates the Supreme Court's efforts to utilize the fourth amendment as a source of procedural guarantees aimed at controlling governmental action that affects freedom of expression. The approach of the Eighth Circuit Court of Appeals in *Kelly*, which subjects the government's taking of expressive materials discovered in a private search to the scrutiny of the fourth amendment, properly guards both the first amendment rights and the privacy interests of absent third parties.

Therefore, I respectfully dissent.

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[10]*See, e.g.*, Black, *Burdeau v. McDowell—A Judicial Milepost on the Road to Absolution*, 12 B.U.L.Rev. 32 (1932); Note, *Seizures by Private Parties: Exclusion in Criminal Cases*, 19 Stan.L.Rev. 608 (1967); Note, *The Fourth Amendment Right of Privacy: Mapping the Future*, 53 Va.L.Rev. 1314, 1336-59 (1969).

APPENDIX B.

Opinion and Order of the Court of Appeals.

United States Court of Appeals, Fifth Circuit.

United States of America, Plaintiff-Appellee, v. Arthur Randall Sanders, Jr., Gulf Coast News Agency, Inc., Trans World America, Inc. a/k/a TWA, Inc. and William Walter, Defendants-Appellants. No. 77-5715.

June 15, 1979.

In a prosecution of defendants for conspiracy, knowing use of a common carrier to ship obscene materials into state, and knowing use of a common carrier to transport obscene material interstate for purposes of sale or distribution, defendants were convicted in the United States District Court for the Middle District of Florida, W. Terrell Hodges, J., and the convictions were affirmed on appeal, 592 F.2d 788. On petition for rehearing and rehearing en banc, the Court of Appeals held that the proper remedy for the Government's engaging in prior restraint in violation of the First Amendment is return of the property in question, not its suppression as evidence at trial.

Petitions for rehearing and rehearing en banc denied.

Appeals from the United States District Court for the Middle District of Florida.

ON PETITIONS FOR REHEARING
AND PETITIONS FOR REHEARING
EN BANC
(Opinion April 2, 1979, 5 Cir., 1979,
592 F.2d 788)

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

PER CURIAM:

The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure, Local Fifth Circuit Rule 16), the Petitions for Rehearing En Banc are also DENIED.

Appellants contend that the Government in this case engaged in prior restraint in violation of the First Amendment. However, the majority of the panel (Judges Ainsworth and Clark) point out that this Court held in *United States v. Bush,* 5 Cir., 1979, 582 F.2d 1016, 1021 (Morgan, J.) that the appropriate remedy for such a violation is "return of the . . . property, . . . not its suppression as evidence at trial." *See also United States v. Echols,* 5 Cir., 1978, 577 F.2d 308.

Thus, even had the Government "abridge[d] the public's First Amendment right to access to" expressive matter in this case, the proper remedy would be "return of the allegedly obscene materials" to the owner, with the Government retaining sample films for evidentiary purposes, "not suppression of these items at a subsequent obscenity trial." *United States v. Cangiano,* 2 Cir., 1972, 464 F.2d 320, 328, *vacated on other grounds,* 413 U.S. 913, 93 S.Ct. 3047, 37 L.Ed.2d 1023, *on remand,* 491 F.2d 905, *cert. denied,* 418 U.S. 934, 94 S.Ct. 3223, 41 L.Ed.2d 1171 (1974); *Huffman v. United States,* 1971, 152 U.S.App.D.C. 238, 244, 470 F.2d 386, 392. *See United States v. Womack,* 1974, 166 U.S.App.D.C. 35, 49-50 n.48, 509 F.2d 368, 382-83 n.48; *United States v. Sherwin,*

9 Cir., 1976, 539 F.2d 1, 8 n.11 (en banc). *Cf. United States v. Alexander,* 8 Cir., 1970, 428 F.2d 1169, 1176; *Tyrone, Inc. v. Wilkinson,* 4 Cir., 1969, 410 F.2d 639, 641; *Metzger v. Pearcy,* 7 Cir., 1968, 393 F.2d 202, 204.

We have found no decision that has deviated from the foregoing authority and that has applied the exclusionary rule under circumstances similar to those here. There was no First or Fourth Amendment violation in this case, and therefore exclusion of the sexually explicit films from evidence in this case would have been erroneous.

APPENDIX C.

Order.

In the United States Court of Appeals for the Fifth Circuit.

United States of America, Plaintiff-Appellee, versus Arthur Randall Sanders, Jr., Gulf Coast News Agency, Inc., Trans World America, Inc., a/k/a TWA, Inc. and William Walter, Defendants-Appellants. No. 77-5715.

Appeals from the United States District Court for the Middle District of Florida.

The motions of APPELLANTS for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including JULY 15, 1979, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ Robert A. Ainsworth
UNITED STATES CIRCUIT JUDGE

APPENDIX D.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the First Amendment are:

> "Congress shall make no law . . . abridging the freedom of speech or of the press. . . ."

2. The provisions of the Fourth Amendment are:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3. The pertinent provisions of the Fifth Amendment are:

> "No person shall . . . be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property, without due process of law . . ."

4. The provisions of the Sixth Amendment are:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

5. 18 U.S.C. §2 provides:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

6. 18 U.S.C. §371 provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

7. 18 U.S.C. §1462 provides in pertinent part:

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

* * *

Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

8. 18 U.S.C. §1465 provides:

Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

When any person is convicted of a violation of this Act, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items described herein which were found in the possession or under the immediate control of such person at the time of his arrest.

9. Rule 14, Federal Rules of Criminal Procedure provides as follows:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

APPENDIX E.

October 23, 1975

Mr. William Boshell
Suite 1435
3340 Peachtree Road, N.E.
Atlanta, Georgia 30326

Dear Mr. Boshell:

Below are the names of corporations and the sole stockholders:

Fun & Games Corp., 100% stock, Carol Maxey

B.A.S.T., 100% stock, Ronald Atkins

T.W.A., 100% stock, Mike Grassi

S.S.W. Corp., 100% stock, Arthur Sanders

Bayou Landing Lmtd., Inc., 100% stock, Lewis C. Bordeaux

Gulf Coast Corp., 100% stock, Wayne Schergen

Yours very truly,

/s/ Glenn Zell
Glenn Zell

GZ/jh